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IN THE
Supreme Court of the United States

JULIANNE M. BOWLER, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF INSURANCE OF THE COMMONWEALTH OF MASSACHUSETTS AND PERMANENT RECEIVER OF AMERICAN MUTUAL LIABILITY INSURANCE COMPANY AND AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,

Petitioner,

v.

UNITED STATES AND JOHN ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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120 pp

QUESTION PRESENTED

Insurance companies are excluded from the Bankruptcy Code, and the liquidation of insolvent insurance companies is conducted by the States under state law. The McCarran-Ferguson Act protects from preemption state laws enacted for the purpose of regulating the business of insurance. Claim filing deadlines in insurer liquidation proceedings make possible the determination of claims and distribution of assets to policyholders. The question presented is:

Whether claim filing deadlines in state insurer liquidation proceedings apply to the United States notwithstanding the general priority for claims of the United States provided by the Federal Priority Statute.

PARTIES TO THE PROCEEDING

The plaintiff-petitioner is Julianne M. Bowler, in her official capacity as Commissioner of Insurance of the Commonwealth of Massachusetts and Permanent Receiver of American Mutual Liability Insurance Company and American Mutual Insurance Company of Boston. Commissioner Bowler was substituted for former Commissioner Linda L. Ruthardt pursuant to Fed. R. App. P. 43 by order entered August 9, 2002. The defendants are the United States and John Ashcroft, in his official capacity as Attorney General of the United States.

The Court of Appeals allowed the following eighteen state insurance guaranty funds to intervene "on a going-forward basis" in its September 18, 2002 decision and by order entered October 29, 2002: Alabama Insurance Guaranty Association, California Insurance Guarantee Association, Connecticut Insurance Guaranty Association, District of Columbia Insurance Guaranty Association, Illinois Insurance Guaranty Fund, Louisiana Insurance Guaranty Association, Maine Insurance Guaranty Association, Massachusetts Insurers Insolvency Fund, Missouri Property and Casualty Insurance Guaranty Association, Nebraska Property and Liability Insurance Guaranty Association, Nevada Insurance Guaranty Association, New Hampshire Insurance Guaranty Association, Pennsylvania Workers' Compensation Security Fund, Rhode Island Insurers' Insolvency Fund, South Carolina Property and Casualty Insurance Guaranty Association, Texas Property and Casualty Insurance Guaranty Association, Vermont Property and Casualty Insurance Guaranty Association, and Virginia Property and Casualty Insurance Guaranty Association.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the Petitioner states that American Mutual Liability Insurance Company and American Mutual Insurance Company of Boston are mutual insurance companies in liquidation conducted by the Commissioner of Insurance for the Commonwealth of Massachusetts. They issued no stock, and accordingly there is no parent corporation or publicly held company that owns 10% or more of either company's stock.

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Insurers Rehabilitation and Liquidation Model Act, III *NAIC Model Laws, Regulations and Guidelines* 555 (2002) 10n, 18

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PETITION FOR WRIT OF CERTIORARI

Pursuant to United States Supreme Court Rules 12, 13, and 14, Julianne M. Bowler, Commissioner of Insurance of the Commonwealth of Massachusetts and Permanent Receiver ("Receiver") of American Mutual Liability Insurance Company and American Mutual Insurance Company of Boston (collectively, "American Mutual"), petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered on September 18, 2002.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 303 F.3d 375 (1st Cir. 2002) and is reproduced in the appendix to this petition ("App."). App. 1a. The decision of the United States District Court for the District of Massachusetts is reported at 164 F. Supp. 2d 232 (D. Mass. 2001) and is reproduced at App. 21a.

JURISDICTION

The judgment of the Court of Appeals was entered September 18, 2002. App. 49a. The Petitioner timely requested rehearing and rehearing *en banc* on October 11, 2002. The Court of Appeals denied that petition by order entered October 31, 2002.[1] App. 47a. The Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

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[1] The eighteen guaranty funds filed a petition for panel rehearing and rehearing *en banc* on November 1, 2002, and the Court of Appeals denied that petition on November 19, 2002.

The Petitioner invoked and the Court of Appeals found jurisdiction pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 109 (Bankruptcy Code)

(b) A person may be a debtor under chapter 7 of this title only if such person is not— . . .

(2) a domestic insurance company . . . ; or

(3) a foreign insurance company . . . engaged in such business in the United States.

* * *

(d) Only a person that may be a debtor under chapter 7 of this title . . . may be a debtor under chapter 11 of this title.

15 U.S.C. § 1011 (McCarran-Ferguson Act)

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1012 (McCarran-Ferguson Act)

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . .

31 U.S.C. § 3713 (Federal Priority Statute)

(a)(1) A claim of the United States Government shall be paid first when—

(A) a person indebted to the Government is insolvent and— . . .

(iii) an act of bankruptcy is committed; . . .

(2) This subsection does not apply to a case under title 11.

(b) A representative of a person or an estate (except a trustee under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable

> to the extent of the payment for unpaid claims of the Government.

Mass. Gen. Laws ch. 175, § 180C

The text of Mass. Gen. Laws ch. 175, § 180C, concerning the appointment of the Commissioner of Insurance as receiver for purposes of liquidating an insurer, is reproduced at App. 52a.

Mass. Gen. Laws ch. 175, § 180F

In pertinent part, the statute provides that "all such claims shall be filed on or before the last date fixed by the court for the filing of claims in the domiciliary proceeding," and it establishes seven successive priority classes for distribution of assets to claimants. The text of Mass. Gen. Laws ch. 175, § 180F, is reproduced at App. 57a.

Mass. Gen. Laws ch. 175D, §§ 1(2), 5(1), 8, and 13

Pertinent provisions of Mass Gen. Laws ch. 175D, §§ 1(2), 5(1), 8, and 13, concerning the Massachusetts Insurers Insolvency Fund, are reproduced at App. 63a-66a.

STATEMENT OF THE CASE

Liquidation proceedings for insurance companies are conducted by state regulatory officials appointed as receivers in proceedings under state law because insurance companies are excluded from the federal Bankruptcy Code. This petition concerns whether one part of the Massachusetts insurer liquidation act — the claim filing deadline or "bar date" — applies to the United States through the McCarran-Ferguson Act, notwithstanding the Federal Priority Statute.

The claim filing deadline established under the Massachusetts statute defines the universe of claims that may share in the assets of an insolvent insurer. The deadline enables a receiver to determine the insurer's total liabilities and distribute its assets in accordance with the statutory priorities. The assets of the two insolvent insurers at issue are expected to be sufficient only to cover administrative expenses and to make a significant distribution to the "policyholder" class of claimants — insureds and third-party claimants that assert rights under insurance policies and the state insurance guaranty funds which by statute are assigned a policyholder's or claimant's rights upon payment of a covered policy claim.

The United States, however, has asserted priority status for future claims against the insolvent insurers under the Federal Priority Statute, which it contends preempts the claim filing deadline. As a result, the total policyholder level claims cannot be determined and *pro rata* distributions of assets cannot be made to policyholders. The United States' potential assertion of future claims without limit prevents the Massachusetts Commissioner of Insurance as receiver from making any payments to policyholder level claimants. Such a distribution of the insurers' assets would expose the Receiver to personal liability under the Federal Priority Statute in the event that the United States presents future policyholder level claims. Distributions can be made only if the United States consents to waive potential future claims, which it is unwilling to do. Specifically, since June 1999, the United States has refused to consent to a $10 million "early access" distribution to insurance guaranty funds because of concern that the remaining assets of the insurers here may not be sufficient to cover its potential, and to this point undiscovered, claims. This has precluded the distribution to policyholder level creditors — almost thirteen years after both insurers were ordered liquidated.

The case was decided on a statement of undisputed material facts and supporting affidavits and documents. No material facts were disputed.

A. Proceedings Below

1. The District Court's decision

The Receiver filed this action against the United States and its Attorney General seeking a declaration that claims of the United States are subject to the claim filing deadline established pursuant to Massachusetts law.[2] The Receiver invoked federal question jurisdiction under 28 U.S.C. § 1331 because the action arose under 31 U.S.C. § 3713 and 15 U.S.C. § 1012. On September 27, 2001, the District Court held that judgment for the Receiver on this claim was "barred" by the Court of Appeals' decision in *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993) (Breyer, C.J.). App. 35a-40a, 46a n.30, 51a. In *Garcia*, the Court of Appeals had held that a Puerto Rico bar date was preempted by the Federal Priority Statute despite the McCarran-Ferguson Act because the bar date was "neither directed at, nor necessary for, the protection of policyholders . . . . The provision helps policyholders only to the extent that (and in the same way as) it helps all creditors." *Garcia*, 4 F.3d at 62.

Although it applied *Garcia*, the District Court questioned that decision, stating:

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[2] The Receiver also sought a declaration that she could pay claims of state insurance guaranty funds prior to non-policyholder claims of the United States in accordance with the state priority scheme. Both the District Court and the Court of Appeals ruled for the Receiver and against the United States on this issue. App. 6a-14a, 26a-33a.

- The *Garcia* decision "has not met with universal acceptance" in that (1) other courts of appeal have "politely questioned" whether the "narrow parsing" of statutes engaged in by the *Garcia* Court was required by *United States Dep't of Treasury v. Fabe*, 508 U.S. 491 (1993), and (2) one district court and a state court of last resort have "rejected" *Garcia* and concluded that a state bar date protects policyholders for McCarran-Ferguson Act purposes by assuring that policyholder claims will be handled in a timely and orderly fashion and reducing the administrative costs of liquidation. App. 36a-37a.

- The record here "suggests the *Garcia* panel may have understated the disruption which an open-ended opportunity for federal government claims has upon insurance liquidation proceedings." Specifically, "[a]bsent a deadline for claims applicable to all creditors, a receiver will not be willing to make a final distribution because the prospect of unanticipated claims would render impossible a final determination. The result would be to require known policyholder creditors to wait indefinitely for reimbursement." App. 37a-38a (footnotes omitted).

The District Court concluded that "[t]here is a compelling argument for the proposition that benefits are accorded policyholders by a state filing deadline in liquidation proceedings. In particular, *Garcia* seems to have been insufficiently sensitive to the fact that

late-filed federal policyholder claims may substantively, and rather directly, interfere with the timely and orderly distribution of funds to general policyholder creditors." App. 40a (first emphasis in original; second added).

2. The Court of Appeals' decision

In its September 18, 2002 decision, the Court of Appeals held that it was "bound" by and adhered to its earlier *Garcia* decision. App. 15a. Although the Court of Appeals stated that *United States Dep't of Treasury v. Fabe*, 508 U.S. 491 (1993), "draws the line at state law that focuses protection on policyholder claims, either directly or indirectly (where the connection is strong . . .)," App. 16a, the court nevertheless echoed *Garcia* in asserting that the bar date was not protected because "[a]n early bar date for United States claims has only a limited effect on policyholders — who have priority anyway — and equally or primarily helps other general creditors." *Id.*

The Court of Appeals recognized that giving the United States an "open-ended exemption" from insurer liquidation filing deadlines was "simply terrible public policy [that] was almost certainly not the result of any considered judgment by Congress." App. 16a-17a. The Court of Appeals explained that:

> [i]f there is no deadline for United States' claims, the Commissioner — who is personally liable for ignoring the Federal Priority Act, 31 U.S.C. § 3713(b) — cannot ever pay off creditors with lower priorities, unless she can wrangle a waiver from the United States. Indeed, this is merely one example of the problems that may be caused by the lack

> of a deadline and by no means a complete catalogue.

App. 17a.[3] However, the Court of Appeals concluded that these problems were for Congress to fix. *Id.* It declined to follow the decisions of a state court of last resort and a federal district court that disagreed with *Garcia* as "not persuasive," commenting that they "implicitly reflect the pressure created where the conduct of an already complicated state proceeding is further complicated by a seemingly unlimited in time (and therefore irrational) veto possessed by the United States." App. 18a.

B. The State Insurer Liquidation Act

The Massachusetts insurer receivership statutes — like those in every State — provide that insolvent insurers are to be liquidated by the State's chief insurance regulatory official, here the Massachusetts Commissioner of Insurance, in proceedings before a state court, here the Supreme Judicial Court for Suffolk County ("Supervising Court"). Mass. G.L. c. 175, § 180C. *See* App. 55a (listing similar state statutes).[4] The Commissioner as

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[3] The second quoted sentence was added on October 29, 2002, after the Receiver filed her petition for rehearing pointing out that the Court of Appeals overlooked a critical point: that the lack of a bar date applicable to the United States means that the Receiver cannot pay policyholder claims until, if ever, the United States grants a waiver of potential future claims.

[4] The Massachusetts insurer receivership statutes, Mass. G.L. c. 175, §§ 180A-180L, are part of a national scheme of regulation by the States. The States, the District of Columbia, and Puerto Rico have all enacted similar statutes to govern the liquidation of insolvent insurance companies based on the Uniform Insurers Liquidation Act, 13 U.L.A. 321 (Master ed. 1986), or the Insurers Rehabilitation and Liquidation Model Act promulgated by the National Association of Insurance

receiver is charged with marshaling the assets of the insolvent insurer and distributing them subject to the order of the Supervising Court. *Id.*

The Massachusetts statutes — again like those of every other State — require that claims against the insolvent insurer be filed by a claim filing deadline (or bar date), in this case, one set by the Supervising Court. Mass. G.L. c. 175, § 180F. *See* App. 60a (listing similar state statutes). The Massachusetts statutes further provide that the assets of the insolvent insurer are to be distributed to seven successive priority classes of allowed claims. "[E]ach priority class shall . . . be paid in full or adequate funds shall be retained for such payment before the members of the next class receive any payment." *Id.* The first four priority classes are: (1) administrative expenses; (2) claims under policies (first claims under workers' compensation policies, then claims under other types of policies), including claims of insurance guaranty funds; (3) claims for unearned premiums; and (4) claims of the United States (other than policyholder claims, which fall into classes 2 and 3). *See id.* The second and third priority classes are the "policyholder" claims. They consist of claims under policies of insurance by insureds and third-party claimants (the holders of policies and persons with rights of recovery under policies) and claims of insurance guaranty funds (the statutory funds that pay most insureds and third-party claimants and are statutorily assigned their rights under policies as described below). Non-policyholder claims of the United States follow in class 4.[5]

Commissioners, III *NAIC Model Laws, Regulations and Guidelines* 555 (2002). *See* III *NAIC Model Laws* 555-63 to 555-67. The Massachusetts statutes are "in major part based upon" the Uniform Act. *Commissioner of Ins. v. Equity Gen. Ins. Co.*, 346 Mass. 233, 235-236, 191 N.E.2d 139, 141 (1963).

[5] Massachusetts, like forty other States, revised its priority statute in response to the *Fabe* Court's holding that a priority for

To expedite the resolution and payment of claims, Massachusetts and all other States have established insurance guaranty funds that pay "covered claims" — claims "which arise[] out of and [are] within the coverage of an insurance policy" issued by an insolvent insurer. *E.g.*, Mass. G.L. c. 175D, § 1(2). Guaranty funds pay covered claims up to the lesser of the policy limits or a statutory cap, usually $300,000, except in the case of workers' compensation claims where there is no cap. *E.g.*, Mass. G.L. c. 175D, § 5(1)(a). The guaranty funds are funded by assessments on their member insurers, which are entitled to recoup the assessments in higher rates and premiums. *See, e.g.*, Mass. G.L. c. 175D, §§ 5(1)(c), 13. These burdens on the insurance-buying public are reduced by payments from the insolvent insurer's estate. Guaranty funds are statutorily assigned the rights of the claimants — all by definition of policyholder priority — who they pay, *e.g.*, Mass. G.L. c. 175D, § 8(1) and (2), and they are also accorded policyholder priority by Mass. G.L. c. 175, § 180F. The receiver is required to apply for approval of an "early access" plan to distribute assets to guaranty funds that agree to return monies if they are needed to pay higher or equal priority creditors. Mass. G.L. c. 175, § 180C.

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employees was preempted by the Federal Priority Statute. *Fabe*, 508 U.S. at 509-510. *See In the Matter of the Liquidation of American Mut. Liab. Ins. Co.*, 434 Mass. 272, 280 n.9, 747 N.E.2d 1215, 1221 n.9 (2001); App. 62a (listing other "*Fabe*-cure" priority statutes).

C. The Massachusetts Liquidation Proceeding

1. The Liquidation Order, transfer of claims to guaranty funds, and distributions to guaranty funds

On January 17, 1989, the Massachusetts Commissioner of Insurance filed a receivership proceeding against American Mutual Liability Insurance Company and American Mutual Liability Insurance Company of Boston, two Massachusetts insurance companies that wrote workers' compensation, general liability, and automobile lines of insurance for commercial and personal lines policyholders. The Supervising Court entered an Order of Liquidation, Appointment of Permanent Receiver and Permanent Injunction (the "Liquidation Order") on March 9, 1989. The Liquidation Order decreed that the insurers were insolvent and appointed the Commissioner of Insurance and his successors as their Permanent Receiver with authority to recover the insurers' assets, settle their affairs, and distribute their assets, subject to the oversight of the Supervising Court.

As a result of the entry of the Liquidation Order, claims under American Mutual policies were generally transferred to the state insurance guaranty funds.[6] Guaranty funds in 46 States and territories have made payments of covered claims under American Mutual policies and sought reimbursement from the estates. As of September 2000, the guaranty funds had reported payments totaling approximately

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[6] American Policyholders' Insurance Company, a solvent subsidiary of one of the insurers, assumed responsibility for many 1988 and 1989 claims because it had reinsured their voluntary business, except for Massachusetts auto coverage, after January 1, 1988, and cut-through endorsements applied to the reinsured policies.

$674 million, and approximately 13,700 claims were pending. The guaranty funds have already paid significantly more in claims than the presently projected assets of the estates. It is anticipated that the assets of the estates will be sufficient only to cover administrative expenses and to make a significant distribution to the Class 2a (workers compensation) policyholder priority class.

On June 22, 1993, the Supervising Court entered an order approving an early access distribution plan and a form of early access distribution agreement under Mass. G.L. c. 175, § 180C. Pursuant to the plan, subsequent orders of the Supervising Court, and consents of the United States, four early access distributions totaling approximately $174 million have been made to eligible insurance guaranty funds in partial reimbursement of their claims (total reimbursements to guaranty funds including proceeds of certain settlements with reinsurance pools are approximately $308 million). As described below, a fifth early access distribution has been approved by the Supervising Court but not made because the United States has refused to consent.

2. The claim filing deadline and United States claims

On March 22, 1989, the Supervising Court entered an order pursuant to Mass. G.L. c. 175, § 180F, requiring that creditors of American Mutual file proofs of claim with the Receiver by March 9, 1990 — the claim filing deadline or "bar date." Approximately 37,000 proofs of claim were filed by that date. The amended plan of liquidation for American Mutual, which was approved by the Supervising Court on June 28, 2002, requires the denial of late-filed claims unless they are determined

on review by the Special Master appointed by the Supervising Court to be timely.

The United States submitted claims both before and after the claim filing deadline. Specifically, the Department of Labor filed timely claims totaling approximately $573,000 against American Mutual for annual special fund assessments under § 44 of the Longshore and Harbor Workers' Compensation Act, and the Environmental Protection Agency ("EPA") filed a timely claim as a creditor of an American Mutual insured in connection with a Superfund site (for which the EPA later appears to have been reimbursed from another source). The EPA claim is a policyholder level claim. Various Medicare contractors submitted 45 late claims totaling approximately $70,000 for reimbursement under the Medicare Act of payments respecting former American Mutual employees, and the Interstate Commerce Commission submitted late claims against American Mutual totaling $140 for certificates of insurance filed with the Commission. The known and quantified United States claims total approximately $643,000.

There appears to be significant potential for additional late-filed claims by the United States. In its brief in the Court of Appeals, the United States stated that it was "concerned that the remaining assets of the insolvent companies might not be sufficient to cover its claims." U.S. Br. 8. Given the claims asserted to date, the United States either anticipates large future policyholder level claims or — thirteen years after the Liquidation Order and twelve years after the claim filing deadline — is unable to determine its potential claims.

3. The position of the United States and its effects

In a letter to the Receiver dated July 20, 1989, the United States Department of Justice asserted that all federal claims "in their full amounts previously and hereafter filed" are entitled to a first priority under the Federal Priority Statute, 31 U.S.C. § 3713. The United States asserts, and the Court of Appeals held, that its claims are not subject to time limits imposed by state law for claims against the estates of insolvent insurers.

This assertion prevents the Receiver from distributing any assets to policyholders. The bar date makes possible a determination of policyholder level claims, including those of the United States, so that distributions can be made. Without an applicable bar date, the United States may at any time assert policyholder claims, either as a policyholder itself or as a claimant against a policyholder (as in the EPA claim noted above). If the Receiver had previously distributed all the assets to other policyholder claimants, including guaranty funds, she would be exposed to personal liability under the Federal Priority Statute for unpaid federal policyholder level claims. *See* 31 U.S.C. § 3713(b).

The Receiver is thus unable to distribute any assets to known policyholder claimants unless the United States consents. The United States has exercised this veto power to prevent distribution from the insurers' estates. Prior to 1999, the United States had granted four conditional waivers of its claims under the Federal Priority Statute to permit interim distributions to insurance guaranty funds pursuant to the early access plan. On May 14, 1999, the Receiver requested a conditional waiver from the United States regarding a proposed fifth early access distribution of $10.125 million to guaranty funds. App. 74a. In September 1998, the Receiver had also offered to set

aside $5 million (or another amount satisfactory to the United States) to meet potential federal claims. App. 67a. The United States failed to respond to the Receiver's repeated requests for a waiver or offer to set aside funds until it filed its motion to dismiss with the District Court in February 2001. In its motion papers, the United States stated that it had made a "decision not to waive" its "claims to the fifth distribution to the state guaranty funds." C.A. App. 126.

REASONS FOR GRANTING THE WRIT

I. THE APPLICABILITY OF A STATE FILING DEADLINE TO CLAIMS OF THE UNITED STATES AGAINST THE ESTATE OF AN INSOLVENT INSURANCE COMPANY IS AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

In this case "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." United States Supreme Court Rule 10(c). The question presented — whether the States may apply filing deadlines to claims by the United States against the estates of insolvent insurance companies — is a recurring question with a national impact on insurance policyholders and the state insurance commissioners charged to protect them.

A. The Application of State Bar Dates Affects Policyholders of Hundreds of Insurers in Liquidation Proceedings Across the Nation.

The Court of Appeals ruled that the McCarran-Ferguson Act does not protect state insurer liquidation

bar dates from preemption by the Federal Priority Statute. This decision will prevent the payment of claims by policyholders and the closure of insurer estates by state insurance commissioners throughout the country. At least one insurer liquidation proceeding was pending in each of the fifty States as of August, 2002, and approximately 450 domestic insurance companies were in liquidation proceedings in the United States as of that date. *See* Nat'l Ass'n of Ins. Comm'rs, *2002 Contact List For Insurers In Receivership* (August 2002), *Contact List For Insurers In Receivership* (August 2002), *both at* http://www.naic.org/receivership/documents (last visited January 13, 2003). The ruling effectively grants to the United States a veto over the payment of policyholder level claimants by the commissioners as receivers. Absent a waiver of potential federal claims, the Federal Priority Statute will subject state regulatory officials, as receivers, to personal liability for distributing funds when the United States has unpaid claims. If state bar dates do not apply to the United States, the United States could file claims in the future and seek to impose personal liability on a receiver who has paid anything other than administrative expenses of the estate. Receivers thus cannot make distributions to policyholders or other creditors unless they can obtain a waiver from the United States.

As this case demonstrates, such a waiver may not be forthcoming even when the estate has long been open and the United States has not identified any claims in years. The Court of Appeals noted, "here, even after a decade, a final waiver has not been provided." App. 17a. The Court of Appeals recognized that giving the United States such an open-ended exemption from bar dates is "simply terrible public policy." App. 16a. The adverse public effects of the position of the United States demonstrate the need for plenary review of the judgment in this case.

The Court of Appeals also noted the national importance of the issue. The court stated that it might "be useful to Congress for [the court] to explain briefly why the policy ought to be reconsidered." As grounds for action by Congress, the Court of Appeals stated that "[b]ecause of the Federal Priority Act, the defunct insurance company cannot be fully liquidated, and its assets fully distributed, until all claims of the United States are satisfied to the extent that remaining assets permit." App. 17a. In casting the issue as one deserving action by Congress, the Court of Appeals acknowledged the interest in the question throughout the nation.

The national interest in the issue follows from the nature of the regulation of the business of insurance. The Massachusetts statute authorizing a bar date for claims against an insolvent insurer is part of a national scheme of insurance regulation administered by the States. All fifty States have enacted statutes to govern the liquidation of insolvent insurance companies based on the Uniform Insurers Liquidation Act, 13 U.L.A. 321 (Master ed. 1986), or the Insurers Rehabilitation and Liquidation Model Act promulgated by the National Association of Insurance Commissioners ("NAIC"), III *NAIC Model Laws, Regulations and Guidelines* 555 (2002). *See* III *NAIC Model Laws* 555-63 to 555-67. All States provide for a bar date in insurer liquidation proceedings, *see* App. 60a (listing state statutes), and state courts and insurance commissioners routinely set bar dates for the filing of claims. The United States routinely files claims in insurer liquidations. The widespread application of bar dates to potential claims by the United States likely led the Court of Appeals to urge Congress to address the "terrible public policy" left in place by the judgment below. The States should not be required, however, to await action by Congress to clarify that the McCarran-Ferguson Act protects state bar dates in insurer liquidations. Plenary review by

this Court would settle this important and recurring question of federal law.

B. The States Have a Federally Recognized Historic Role in Protecting Policyholders Which Is Significantly Affected by the Bar Date Issue.

Plenary review is further supported by the significant impact of the ruling below on federalism. The veto granted to the United States obstructs an historical role of state insurance commissioners: the protection of policyholders by the payment of claims through the orderly liquidation of insolvent insurers. Massachusetts, for instance, enacted statutes regulating insurance companies as early as 1818, Mass. St. 1818, c. 120, and authorized state officials to commence receivership proceedings against insurers in the state's highest court as early as 1855. Mass. St. 1855, c. 124, § 8. Massachusetts enacted its version of the Uniform Insurers Liquidation Act in 1939, Mass. St. 1939, c. 472, § 3, the same year the Uniform Act was approved by the National Conference of Commissioners on Uniform State Laws, 13 U.L.A. 321 (Master ed. 1986), and three years after the proposal of a model act by the NAIC. 1 *Proc. of the Nat'l Ass'n of Ins. Comm'rs, Sixty-Seventh Sess.* 29-33 (1936). This Court has recognized the longstanding role of the States in conducting insurer liquidation proceedings. *See Penn Gen. Cas. Co. v. Pennsylvania*, 294 U.S. 189, 197 (1935) (approving federal court deference to state insurer liquidation proceeding brought by Pennsylvania insurance commissioner). Congress has recognized the historical role of the States in two federal statutes: (1) the express exclusion of insurers from the Bankruptcy Code, and (2) the broad savings clause for state laws "regulating

the business of insurance" protected by the McCarran-Ferguson Act.

In the first statute, Congress granted to the States exclusive control over insurer insolvencies by expressly exempting domestic insurance companies from the definition of debtors subject to the Bankruptcy Code. *See* 11 U.S.C. § 109(b)(2). "Banking institutions and insurance companies are excluded from liquidation under the bankruptcy laws because they are bodies for which alternate provision is made for their liquidation under various regulatory laws." H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 318 (1977), *reprinted in* 1978 U.S.C.C. & A.N. 5963, 6275. *Accord*, S. Rep. No. 95-989, 95th Cong., 2d Sess. 31 (1978), *reprinted in* 1978 U.S.C.C. & A.N. 5787, 5817. This exemption was carried forward from the prior Bankruptcy Act, § 4, as amended in 1910, 36 Stat. 838, into the Bankruptcy Code. *See Vallely v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348, 355-56 (1920). "Congress meant to leave to local winding up statutes the liquidation of such companies; that, since the states commonly kept supervision over them during their lives, it was reasonable that they should take charge on their demise." *In Re Union Guarantee & Mortgage Co.*, 75 F.2d 984, 984-85 (2d Cir.) (*per curiam*), *cert. denied*, 296 U.S. 594 (1935).

In the second statute — the McCarran-Ferguson Act — Congress in 1945 "declare[d] that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011. The Act further provides that the "business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business" and "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the

purpose of regulating the business of insurance, unless such Act [of Congress] specifically relates to the business of insurance . . . ." 15 U.S.C. § 1012.[7] In enacting the McCarran-Ferguson Act in 1945, Congress should be presumed to have been aware of the historical role of the States in insurance receiverships. *See* 91 Cong. Rec. 483 (January 25, 1945) (Sen. Ferguson) ("States can regulate and can tax insurance in all its phases"); 91 Cong. Rec. 1481 (February 27, 1945) (Sen. Ferguson) (referring to the threat of insolvency). The Court of Appeals has construed the Bankruptcy Code and the McCarran-Ferguson Act in a way that severely hampers an historical function of state governments. This impact on federalism further demonstrates the need for review by this Court.

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF STATE AND FEDERAL COURTS UPHOLDING STATE FILING DEADLINES AND DEPARTS FROM THE APPROACH OF OTHER CIRCUIT COURTS ON THE PROTECTION OF STATE LIQUIDATION PROCEEDINGS UNDER THE MCCARRAN- FERGUSON ACT.

A. A State Supreme Court and a Federal District Court Have Expressly Disagreed with the First Circuit and Upheld State Bar Dates Against Claims of the United States Under the Federal Priority Statute.

The decision of the Court of Appeals directly conflicts with decisions of the Supreme Court of West

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[7] In 1999, in the Gramm-Leach-Bliley Act, Congress confirmed that the McCarran-Ferguson Act "remains the law of the United States." 15 U.S.C. § 6701(a).

Virginia and the United States District Court for the Northern District of Illinois. Each held that the McCarran-Ferguson Act permits a State to apply its bar date to claims by the United States. *State ex rel. Clark v. Blue Cross Blue Shield of West Virginia, Inc.*, 203 W.Va. 690, 510 S.E.2d 764, 783-86 (W.Va. 1998); *Boozell v. United States*, 979 F. Supp. 670, 675 n.3 (N.D. Ill. 1997). Each court expressly declined to follow the First Circuit's earlier decision on the issue in *Garcia*, 4 F.3d at 62 (Breyer, C.J.), the decision that the First Circuit in this case found to be binding on the question of the validity of the bar date.

In *Boozell*, the Northern District of Illinois held that federal contingent claims in an Illinois insurer liquidation proceeding "must comply with the bar dates set by the Liquidation Court." 979 F. Supp. at 675 n.3. The court rejected *Garcia* and instead relied on the Second Circuit's broader view of the McCarran-Ferguson Act stated in *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41, 45 (2d Cir. 1995), which upheld a Kentucky law that foreclosed the arbitration of claims against insolvent insurers against a challenge under the Federal Arbitration Act. *Boozell*, 979 F. Supp. at 677-679. Similarly, in *Clark*, the Supreme Court of West Virginia held that, "under the operation of the McCarran-Ferguson Act," the West Virginia liquidation statute "reverse preempts" the Federal Priority Statute and thus protects a state bar date that subordinated late-filed federal claims. 510 S.E.2d at 786. The West Virginia court cited the *Boozell* court's criticism of the First Circuit's decision in *Garcia*, stating that "the courts affording a broader interpretation of *Fabe* have chosen the better course." 510 S.E.2d at 785, 786.

The Court of Appeals declined to follow *Clark* and *Boozell*, characterizing them as "not persuasive in their reasoning." "Rather," the court said, "they implicitly reflect the pressure created where the conduct of an already complicated state proceeding is further complicated by a seemingly unlimited in time

(and therefore irrational) veto possessed by the United States." App. 18a. Whatever the merits of this view, the decision of the First Circuit shows that the conflict in the lower courts has ripened and warrants review by this Court at this time.

B. The Decision of the Court of Appeals Departs from the Approach of Other Courts of Appeals That Have More Broadly Protected State Laws That Regulate Insurer Liquidations.

The decision of the Court of Appeals also departs from decisions of the Tenth, Fifth, and Second Circuit Courts of Appeals that have taken a broader view of the protection accorded state insurer liquidation provisions under the McCarran-Ferguson Act, as construed in *Fabe*. In *Fabe*, this Court required that a state statute be "reasonably necessary to further the goal of protecting policyholders" in order to be protected by the McCarran-Ferguson Act. 508 U.S. at 509. The Court held that Ohio's priority for administrative expenses was protected by the McCarran-Ferguson Act under this standard because without it, "liquidation could not even commence," even though the priority plainly benefited all claimants, not just policyholders. *Id.* The First Circuit, however, held that the bar date was not protected because it "has only a limited effect on policyholders . . . and equally or primarily helps other general creditors." App. 16a. As explained further in Argument III, below, this standard conflicts with *Fabe*. In addition, the First Circuit's focus on the benefit of a bar date to non-policyholder claimants also conflicts with the approach taken by three other circuits.

The Fifth and Tenth Circuits have recognized that state insurer liquidation laws may be "reasonably necessary to further the goal of protecting policy-

holders," and thus protected by the McCarran-Ferguson Act, "even though they may also benefit other creditors." *Munich Am. Reins. Co.* v. *Crawford*, 141 F.3d 585, 594 (5th Cir.), *cert. denied*, 525 U.S. 1016 (1998) (McCarran-Ferguson preserves Oklahoma statute authorizing injunctions against actions that interfere with insurer receiverships; rejecting challenge under Federal Arbitration Act). In *Munich Am. Reins. Co.*, the Fifth Circuit acknowledged that the Oklahoma statute inured to the benefit of all creditors, "[b]ut this fact alone did not alter the insurance-related character of the Ohio provision in *Fabe*." *Id.* at 593. The Tenth Circuit has taken the same approach. "By offering benefits to other creditors," the court stated, "that ultimate purpose [*i.e.*, protecting policyholders] is neither diminished nor denigrated." *Davister Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277, 1281 (10th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999). In *Davister Corp.*, the Tenth Circuit upheld a Utah statute that consolidated all claims against a liquidating insurer in the supervising state court and rejected an attempt to compel arbitration under the Federal Arbitration Act. Similarly, as noted above, the Second Circuit took a broad view of *Fabe* in upholding a Kentucky law that foreclosed the arbitration of claims against insolvent insurers against a challenge under the Federal Arbitration Act. *Stephens v. American Int'l Ins. Co.*, 66 F.3d at 45 (The Kentucky liquidation act "'protects' policyholders . . . by assuring that an insolvent insurer will be liquidated in an orderly and predictable manner and the anti-arbitration provision is simply one piece of that mechanism."). These decisions of other Courts of Appeals — unlike the decisions of the First Circuit — hold that the question posed by *Fabe* is not whether other claimants may benefit, but whether a state provision is reasonably necessary to further the goal of protecting policyholders.

Finally, the need for review by this Court is shown by the internal conflict in the decision below in applying *Fabe*. In its discussion of the guaranty fund priority issue (decided in favor of the Receiver and against the United States), the Court of Appeals recognized that a benefit to other claimants is not the issue under *Fabe*, in that *Fabe* "upheld a priority for administrative expenses . . . because these reimbursements facilitated payment to policyholders," regardless of the resulting benefit for non-policyholders. App. 10a (emphasis in original). However, the Court of Appeals departed from this approach in striking the Massachusetts bar date, apparently judging itself bound by the earlier *Garcia* decision, which held that a bar date was not protected because it was "neither directed at, nor necessary for, the protection of policyholders." According to *Garcia*, the bar date "helps policyholders only to the extent that (and in the same way as) it helps all creditors." 4 F.3d at 62. The court's own inconsistency in applying the McCarran-Ferguson Act to insurer liquidations after *Fabe* graphically illustrates the continuing conflict in the lower courts.

Given the conflict in the lower courts, there is no sufficient reason for this Court to await further developments before reviewing the question presented in this case. The United States has claimed and exercised a powerful veto over payments to policy-holder level claimants and the closure of insurer liquidations by state officials throughout the country. In this case, the United States has declined even a conditional waiver to permit interim payments from the estate, and it also has rejected an escrow proposed by the Receiver, in an amount which is multiples of the claims submitted to date, both of which would have served to promote the payment of policyholders and progress toward closure of the estate. App. 67a, 74a. There is no reason to believe that the United States will stand down from its current position in

other States. The United States will thus continue to prevent the payment of policyholders and the closure of insurer estates throughout the country. That prospect demonstrates the need for review by the Court at this time.

III. THE COURT OF APPEALS MISCONSTRUED THE CONTROLLING MCCARRAN-FERGUSON ACT STANDARDS AS ARTICULATED BY THIS COURT IN *FABE*.

The Court of Appeals misapplied the McCarran-Ferguson Act as construed in *Fabe* by disregarding the benefits of a bar date to policyholders and focusing instead on incidental benefits to lower priority creditors. In *Fabe*, the Court noted that the "broad category of laws enacted 'for the purpose of regulating the business of insurance'" under the McCarran-Ferguson Act consists of laws "that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." 508 U.S. at 505, quoting *Black's Law Dictionary* 1236, 1286 (6th ed. 1990).[8] *See id.* at 501 (McCarran-Ferguson protects state laws "aimed at protecting or regulating" the insurer-insured relationship "directly or indirectly"), quoting *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969). The Court held that the McCarran-Ferguson Act protected a state insurer liquidation statute where the statute was "reasonably necessary to further the goal of protecting policy-holders," 508 U.S. at 509, and it upheld two portions

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[8] As in *Fabe*, the other two aspects of § 1012(b) are not at issue. The parties agree that the Federal Priority Statute does not "specifically relate[] to the business of insurance" and that its application would "invalidate, impair, or supersede" the state statute. *See Humana Inc. v. Forsyth*, 525 U.S. 299 (1999); *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996).

of the Ohio priority statute against challenge by the United States under the Federal Priority Statute.

The Court first sustained the state preference for policyholders, explaining that "[t]he primary purpose of a statute that distributes the insolvent insurer's assets to policyholders in preference to other creditors is identical to the primary purpose of the insurance company itself: the payment of claims made against policies." *Id.* at 505-06. Most significantly for this case, the Court also upheld the "preference accorded by Ohio to the expenses of administering the insolvency proceeding" because that preference was "reasonably necessary to further the goal of protecting policyholders." *Id.* at 509. It explained that, "[w]ithout payment of administrative costs, liquidation could not even commence." *Id.*

The *Fabe* Court's rationale for concluding that the administrative expense priority falls within the McCarran-Ferguson Act's protections — that the priority advances the interests of policyholders by making the liquidation possible — also encompasses the bar date provision at issue here. As the District Court noted, the record shows that, without an effective bar date, a receiver cannot determine or make distributions to policyholders: "The result would be to require known policyholder creditors to wait indefinitely for reimbursement." App. 38a. Without a bar date applicable to the United States, there is no assurance that a receiver would ever be safe in making a distribution to policyholders. While a bar date may also make possible distributions to lower priority creditors, the same is true for the payment of administrative expenses, which may assist lower priority creditors by making liquidation possible.

The Court of Appeals, however, held that the potential benefit of a bar date to lower priority creditors (who ironically will not receive any distributions from American Mutual due to insufficiency of assets) took the state statute outside

of the McCarran-Ferguson Act. This misconstrued *Fabe* in two ways. First, the Court of Appeals applied the wrong standard. It found binding its earlier decision in *Garcia*, which it quoted as saying that the filing deadline was "neither directed at, nor necessary for, the protection of policyholders . . . . The provision helps policyholders only to the extent that (and in the same way as) it helps all creditors." App. 15a, quoting 4 F.3d at 62. The Court of Appeals then asserted that application of the bar date to the United States "has only a limited effect on policyholders — who have priority anyway — and equally or primarily helps other general creditors." App. 16a. *Fabe*, however, required only that a state statute be "reasonably necessary to further the goal of protecting policyholders," not that it "primarily help" or be only "directed at" or "necessary" to protect them. 508 U.S. at 509. *Fabe* did not suggest that potential benefit to non-policyholder creditors disqualified a provision from protection. Only where a provision "is designed to further the interests of other creditors" is it outside McCarran-Ferguson. *Fabe*, 508 U.S. at 508.

Second, the Court of Appeals failed to address the central issue under *Fabe*: the benefit of a filing deadline to policyholders. The Court of Appeals focused instead on the potential benefit to lower priority creditors, although it acknowledged that non-payment of those creditors was only "one example" of the problems caused by a lack of a deadline, and not a "complete catalogue." App. 17a. The Court of Appeals ignored the record showing that the bar date benefits policyholders by making possible the determination and payment of distributions to policyholders. C.A. App. 47-48, 57-59, 154-57. *See* App. 37a-38a. Indeed, when the bar date is considered in connection with the successive statutory priorities, it is plain that the bar date benefits policyholders first. Only if the policyholders are paid in full will the bar date benefit other creditors. *See* Mass. G.L. c. 175, § 180F.

The Court of Appeals' misapplication of *Fabe* is of national significance because, as shown above in Arguments I and II, the conflicting cases leave state regulatory officials nationwide, at best, in doubt of their ability to pay policyholders in insurer liquidation proceedings, and, at worst, unable to pay policyholders at all.

CONCLUSION

For the reasons stated above, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

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January 2003

APPENDIX TO THE PETITION

APPENDIX A

Opinion of the Court of Appeals in Ruthardt v. United States, Nos. 01-2553, 01-2587, 01-2668 (1st Cir., September 18, 2002, as amended October 11, 2002 and October 29, 2002) 1a

APPENDIX B

Memorandum and Order of the District Court in Ruthardt v. United States, C.A. No. 00-12417-DPW (D. Mass., September 27, 2001) 21a

APPENDIX C

Order denying Receiver's petition for rehearing and rehearing en banc in Ruthardt v. United States, Nos. 01-2553, 01-2587, 01-2668 (1st Cir. October 31, 2002) 47a

APPENDIX D

Judgment in Ruthardt v. United States, Nos. 01-2553, 01-2587, 01-2668 (1st Cir., September 18, 2002) 49a

APPENDIX E

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APPENDIX G

Letter dated September 16, 1998 from J. David Leslie to Sandra P. Spooner 67a

APPENDIX H

Letter dated May 14, 1999 from J. David Leslie to Sandra P. Spooner 74a

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 01-2553

LINDA RUTHARDT,
in her official capacity as COMMISSIONER OF INSURANCE
OF THE COMMONWEALTH OF MASSACHUSETTS
and PERMANENT RECEIVER OF
AMERICAN MUTUAL LIABILITY INSURANCE COMPANY and AMERICAN
MUTUAL INSURANCE COMPANY OF BOSTON,
Plaintiff,

v.

UNITED STATES OF AMERICA and JOHN ASHCROFT,
in his official capacity as
ATTORNEY GENERAL OF THE UNITED STATES,
Defendants, Appellees.

ALABAMA INSURANCE GUARANTY ASSOCIATION, ET AL.,
Movants, Appellants.

No. 01-2587
No. 01-2668

LINDA RUTHARDT,
in her official capacity as COMMISSIONER OF INSURANCE
OF THE COMMONWEALTH OF MASSACHUSETTS
and PERMANENT RECEIVER OF
AMERICAN MUTUAL LIABILITY INSURANCE COMPANY and AMERICAN
MUTUAL INSURANCE COMPANY OF BOSTON,
Plaintiff, Appellant/Cross-Appellee,

v.

UNITED STATES OF AMERICA and JOHN ASHCROFT,
in his official capacity as
ATTORNEY GENERAL OF THE UNITED STATES,
Defendants, Appellees/Cross-Appellants.

ALABAMA INSURANCE GUARANTY ASSOCIATION, ET AL.,
Movants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Douglas P. Woodlock, U.S. District Judge]

Before
Boudin, Chief Judge,
Selya, Circuit Judge
and Greenberg,* Senior Circuit Judge

Joseph C. Tanski with whom Alan J. Cooke, David B. Mack and Hutchins, Wheeler & Dittmar, P.C. were on brief for movants, appellants.

Kathleen A. Kane, Appellate Staff, Civil Division, Department of Justice, with whom Robert D. McCallum, Jr., Assistant Attorney General, Michael J. Sullivan, United States Attorney, and Robert M. Loeb, Appellate Staff, Civil Division, Department of Justice, were on brief for defendants, appellees.

Thomas A. Barnico, Assistant Attorney General, Government Bureau, with whom Thomas F. Reilly, Attorney General, J. David Leslie and Eric A. Smith, Special Assistant Attorneys General, Rackemann, Sawyer & Brewster were on brief for plaintiff, appellant/cross-appellee.

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*Of the Third Circuit, sitting by designation.

Joseph C. Tanski, Alan J. Cooke, David B. Mack and Hutchins, Wheeler & Dittmar, P.C. on brief for Insurance Guaranty Funds, Amicus Curiae.

Rowe W. Snider, Steven T. Whitmer and Lord Bissell & Brook on brief for National Conference of Insurance Guaranty Funds, Amicus Curiae.

Joel A. Glover, Franklin D. O'Loughlin, Rothgerber Johnson & Lyons LLP, Joseph F. Ryan and Lyne Woodworth & Evarts LLP on brief for National Organization of Life and Health Insurance Guaranty Associations, Amicus Curiae.

Kathleen A. Kane, Appellate Staff, Civil Division, Department of Justice, with whom Robert D. McCallum, Jr., Assistant Attorney General, Michael J. Sullivan, United States Attorney, and Robert M. Loeb, Appellate Staff, Civil Division, Department of Justice, were on brief for defendants, appellees/cross-appellants.

September 18, 2002
[As amended October 11, 2002
and October 29, 2002]

BOUDIN, Chief Judge. On these appeals, plaintiff the Massachusetts Commissioner of Insurance ("the Commissioner") argues that--under the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq. (2000)--two provisions of state law govern claims by the United States in a state insurance company liquidation proceeding. The district court said yes as to one issue (claims priority) and no as to the other (bar date). We agree.

On March 9, 1989, a Massachusetts state court determined that two Massachusetts insurance companies (collectively, "American Mutual") were insolvent. The court then appointed the Commissioner as permanent receiver to conduct their liquidation. On March 22, 1989, in accordance with state law, the court entered an order requiring all creditors of American Mutual to file proofs of claim with the receiver within one year of the liquidation

date (i.e., by March 9, 1990). See Mass. Gen. Laws ch. 175, § 180F (2000); In re Liquidation of Am. Mut. Liab. Ins. Co., 747 N.E.2d 1215, 1219 (Mass. 2001).

Agencies of the United States eventually filed claims against the two insurance companies totaling over $640,000. Some of the claims were filed after the one-year deadline; these late-filed claims comprised $140 claimed by the late Interstate Commerce Commission and $69,865 claimed by Medicare contractors. The United States has asserted throughout that all of its claims are entitled to priority over claims of the so-called "guaranty funds" and that the one-year bar date does not apply to any of its claims.

Virtually all states have set up insurance guaranty funds to protect policyholders if and when insurance companies go bankrupt. Although the extent of coverage varies, in general covered claims by policyholders against an insolvent insurer are paid by the fund. The fund in turn acquires and can enforce (the legal phrase is "subrogated to") the insured's claim against the insurer assets held by the receiver. See, e.g., Mass. Gen. Laws ch. 175D, § 8(1) (2000). American Mutual did business in a number of states, and payments (as of September 2000) by guaranty funds in 46 jurisdictions to policyholders of American Mutual totaled over $650 million.

After making a number of partial payments to the guaranty funds--which are the largest creditors in the liquidation--the Commissioner on May 14, 1999, filed a liquidation plan in state court. The plan proposes to distribute remaining American Mutual assets as provided under Massachusetts law: pertinently, first priority is for administrative claims; second, for policyholder claims including subrogated claims made by guaranty funds; third, for unearned premiums; and fourth, for non-policyholder claims of the United States. Mass. Gen. Laws ch. 175, § 180F.

The American Mutual assets held by the receiver do not suffice to cover all claims. The United States, which had consented to earlier distributions, insisted that as a matter of federal law its priority trumped that of the guaranty funds and also that the one-year bar date could not be applied to its late-filed claims. In response, the Commissioner, who can be held personally liable under federal law for ignoring proper claims of the United States, 31 U.S.C. § 3713(b) (2000), brought the present declaratory judgment action in the district court to settle the two issues.

Various guaranty funds from Massachusetts and other jurisdictions[1] sought to intervene; the district court denied them intervenor status but allowed them to file amicus briefs. On cross motions for summary judgment, the district court determined that, by "reverse preemption," the McCarran-Ferguson Act allowed state law to override otherwise applicable federal law, thus according the guaranty funds priority over the United States as to subrogated policyholder claims. Ruthardt v. United States, 164 F. Supp. 2d 232, 241 (D. Mass. 2001). Conversely, relying on a prior decision of this court, the district court held that the United States was not bound by Massachusetts law's one-year requirement for filing claims. Id. at 244-45.

The United States now appeals to contest the priority ruling. The Commissioner cross-appeals as to the time bar ruling. The guaranty funds appeal from the denial of intervention. For reasons that will become apparent, the important open issue on these appeals, which is subject to de novo review, Euromotion, Inc. v. BMW of N. Am., Inc., 136 F.3d

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[1] The states represented by the guaranty funds are Alabama, California, Connecticut, the District of Columbia, Illinois, Louisiana, Maine, Massachusetts, Missouri, Nebraska, Nevada, New Hampshire, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, and Virginia.

866, 869 (1st Cir. 1998), concerns the United States' claim to priority over the guaranty funds.

Claims Priority. The priority issue is framed by several statutes. The first is the Federal Priority Act, 31 U.S.C. § 3713 (2000), which gives first priority ("shall be paid first") to the United States for its claims against, inter alia, an insolvent entity's estate. By express qualification, this provision does not apply to Bankruptcy Code proceedings, id. § 3713(a)(2), but this qualification does not extend to state proceedings to liquidate insurance companies.

Instead, to preserve state priorities, the Commissioner relies upon the McCarran-Ferguson Act, which as amended provides as follows (the critical language is underscored):

> Section 1. Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> Section 2.
> (a) State regulation
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
> (b) Federal regulation
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or

> tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

15 U.S.C. §§ 1011-12 (emphasis added).

The statute's origins are familiar. In United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944), the Supreme Court held that insurance, hitherto regulated by the states as a local activity, fell within the Commerce Clause and was therefore subject to federal antitrust regulation. Congress responded with the McCarran-Ferguson Act. The provision of primary interest here--the underscored language of section 2(b)--immunizes against federal statutory preemption those state statutes enacted "for the purpose of regulating the business of insurance."[2]

Unsurprisingly, the Commissioner argues that the quoted language embraces the Massachusetts priority statute insofar as it prefers the claims of guaranty funds arising out of their payments to

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[2] Section 2(a) of the statute effectively safeguards state insurance regulation against preemption through the dormant Commerce Clause doctrine. In section 2(b), Congress intended to protect state regulation against federal statutory preemption, but it added two limitations: state regulation is not protected where Congress enacts a statute that "specifically relates to the business of insurance"; and, in addition, the federal antitrust laws apply to insurance companies "to the extent that [the business of insurance] is not regulated by State Law." Neither limitation is at issue here.

policyholders. Put differently, the Commissioner says that the quoted language means that the Federal Priority Act does not "supercede" this facet of the priority statute. In shorthand, this can be called "reverse preemption"--of federal law by state law--by Congress' consent.

If the McCarran-Ferguson Act were read in lay terms, the Commissioner would easily prevail. In ordinary usage, the liquidation of American Mutual was surely part of the state's regulation of the insurance business; and, as we will see, the Massachusetts statute according priority (over the United States) to guaranty funds for their subrogated claims is part of a scheme directed to protecting policyholders by assuring prompt and full payment of covered claims. But the Supreme Court has read the exemption more narrowly than literally, making this an extremely close case.

Suffice it to say that the narrowing has been based in part on legislative history and in part on policy concerns. One special policy concern relates to a desire to assure antitrust enforcement; but even when antitrust is not at issue the Court has in general read "business of insurance" restrictively, focusing on the insurance contract and the protection of policyholders. See Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982). Other insurance-related regulation or activities have also been deemed outside the protection of the McCarran-Ferguson Act. The leading cases include Pireno, Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205 (1979), SEC v. National Securities, Inc., 393 U.S. 453 (1969), and United States Department of Treasury v. Fabe, 508 U.S. 491 (1993).[3]

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[3] Pireno, 458 U.S. at 130 (use of peer review committee to assess reasonableness of chiropractic services not part of the business of insurance); Royal Drug Co., 440 U.S. at 213-14 (insurer's agreement with participating pharmacies to provide benefits to policyholders not part of the business of insurance);

Fabe dealt directly with the question whether the Federal Priority Act superceded a state statute governing priorities in insurance company liquidation. There, the Ohio statute in question assigned all government claims a lower priority than, inter alia, administration expenses, employee claims for wages due, policyholder claims, and the claims of non-governmental creditors. By a five-to-four vote, the Supreme Court upheld the priority for policyholders and for administrative expenses, the latter on the ground that they were essential for the liquidation and therefore for policyholders' receipt of payments. Fabe, 508 U.S. at 493, 508-09.

But so far as the Ohio statute gave priority to employee and general creditor claims, Fabe held that the McCarran-Ferguson Act did not protect the statute "because their [the employee and creditor claims] connection to the ultimate aim of insurance [was] too tenuous," 508 U.S. at 509; and accordingly, the Federal Priority Act did give the United States priority ahead of those two classes. Four dissenting justices thought that the liquidation statute in its entirety failed to qualify as regulation of the business of insurance and that the United States had priority over all claims. Id. at 517 (Kennedy, J., dissenting).

If and when the next case reaches the Supreme Court, the dissenting position in Fabe could prevail. That position may be closer to the mainstream of prior Court cases on the McCarran-Ferguson Act and, anyway, all four Fabe dissenters still sit while two of the Fabe majority have left the bench. But for now the premises of the Fabe majority govern lower courts, see State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("[I]t is this [Supreme] Court's prerogative alone to overrule one of its precedents."), so for us the only question is where those premises lead. Unfortunately, answering

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Nat'l Sec., 393 U.S. at 460 (state law regulating merger of insurers not part of the business of insurance). Fabe is discussed immediately below.

that question is difficult because our own case is very close to Fabe but arguably a small step beyond.

Prior to Fabe, the touchstone of McCarran-Ferguson protection was the insurer-insured contract. Fabe deemed the Ohio liquidation provisions, so far as they gave priority for payment to policyholders out of the defunct insurer's assets, to be close enough to enforcement of the original contract to qualify for McCarran-Ferguson protection. The Court also upheld a priority for administrative expenses as necessary to assure policyholder payments, but held invalid (as against the Federal Priority Act) the state priority for payments for past wages of company employees and payments to creditors other than policyholders.

Strictly speaking, the priority that Massachusetts gives to guaranty funds is not absolutely "necessary"--from a short-term perspective--to assure payment by the funds to policyholders. If the "necessity" test were met, then Fabe would clearly resolve the matter in favor of the Commissioner. But the obligations of the guaranty funds to pay covered policy claims exists whether or not the guaranty funds are then reimbursed; direct assessments against the insurers will be increased to cover the gap. Similarly, the state priority for guaranty funds gives the funds, not policyholders, a priority over the United States. To this extent, the guaranty funds might appear to resemble general creditors who under Fabe did not get priority over the United States.

This perspective is too narrow. Fabe's premise was not that priority (over the United States) for policyholders is all right and priority for anyone else is not; Fabe itself upheld a priority for administrative expenses of liquidation (and apparently for administrative expenses of guaranty funds, too, see 508 U.S. at 495 n.2) because these reimbursements facilitated payment to policyholders. In other words, priorities that indirectly assure that policyholders get

what they were promised can also trigger McCarran-Ferguson protection; the question is one of degree, not of kind. See id. at 509 (upholding administrative expenses as "reasonably necessary" and striking down general creditor claims as "too tenuous[ly]" connected).

The priority that Massachusetts affords to guaranty funds is part and parcel of an integrated regime aimed at the protection of policyholders. Reimbursements to the funds are a significant source of revenue for making covered payments to policyholders; for example, as of September 15, 2000, such payments to the guaranty funds financed approximately forty-six percent of the payments to policyholders in the American Mutual liquidation. Without the priority for such reimbursements, payments to policyholders could in practice be less secure and would at the very least be delayed in some instances. Prompt payment is one of the main benefits of guaranty funds.

That policyholders benefit from a state regulation is not automatically enough to assure it McCarran-Ferguson protection. Merely reducing insurer costs (through low cost purchasing or peer review schemes) may benefit policyholders in the long run, but the connection may be too remote. See, e.g., Pireno, 458 U.S. at 130; Royal Drug, 440 U.S. at 213-14. But, as already noted, the issue is one of directness and degree. Here, we are concerned with funding payment of promised benefits to policyholders, and payment of benefit to policyholders is just what Fabe said is within the general ambit of the McCarran-Ferguson Act.

The United States concedes that, under Fabe, the policyholders have priority over its own claims. Yet the guaranty funds are little more than a mechanism for advancing the money to pay policyholders promptly and then recovering those advances out of the estate assets, ahead of the United

States, just as the policyholders could have done directly. If the state statutes had described the fund payments as merely loans, conditioned on the policyholders advancing their own priority claims to repay the loans, the United States would lose.

It thus becomes apparent that the United States is using the Federal Priority Act not to maintain its priority but to enlarge it. If the policyholder makes a direct claim against the estate, that claim is satisfied out of estate assets ahead of the United States. If (for speed and certainty) the policyholder is instead paid by the guaranty fund, and the guaranty fund then seeks to recoup, the United States' position in this case would mean that the same assets of the estate are subject to a priority claim of the United States. This would be a perverse result.

Of course, if Congress directed such a result, it would be the job of courts to enforce it. But the interplay of the Federal Priority Act and the McCarran-Ferguson Act is assuredly something about which Congress thought little. The ironing of such wrinkles, as with many such statutes, has been left to the courts. Fabe, which is just such a judicial construct, may not literally dictate the outcome here; but, all things considered, upholding the priority of the funds is consistent with the logic and spirit of Fabe.

The United States makes three arguments for an outcome in its favor. The best grounded is its claim that the state priority for guaranty funds does not easily satisfy the Supreme Court's pre-Fabe criteria for identifying the "business of insurance"; in particular, the state priority does not directly regulate the insurance contract between insurer and insured, previously invoked by the Court as a touchstone. That is so, but that was equally true of Fabe's priority for administrative expenses and perhaps even its priority for policyholder claims against the defunct insurer. If such priorities were close enough in Fabe

to satisfy the old criteria, they have to be close enough for us.

The second argument is that whether the fund is repaid ahead of the United States has nothing to do with protecting policyholders but is simply a benefit for the insurance industry. This is at most a half truth, and the half that is true does not matter. Yes, the industry will be better off if the funds have a priority since direct assessments against the industry will be less. But the priority for the funds primarily provides adequate resources for a payment scheme whose central mission is to achieve prompt payment for policyholders of what their insurance policies promised them.

The final argument, admittedly inventive, is that some policyholders will be worse off if the guaranty funds get their state-law priority: if the funds' state law priority is upheld, they will compete for estate assets with policyholder claims that are not covered by fund protection;[4] but, if the priority is struck down, those same assets (after liquidation expenses) will all be available first for uncovered policyholder claims, after which the United States will come in ahead of the guaranty funds. Not amused by this attempt of the United States to pose as a friend of the policyholders, the district court called this argument "specious." Ruthardt, 164 F. Supp. 2d at 240.

It is not quite that. The district court's point was that "[i]n the absence of guaranty funds," the policyholders' covered claims would compete with

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[4] In general, guaranty funds do not "guarantee" the payment of all claims. In Massachusetts, only certain "covered claims" are eligible for payment, and coverage is usually limited to a $300,000 cap except in the case of workers' compensation claims (where there is no cap). Mass. Gen. Laws ch. 175D, §§ 1(2), 5(1)(a) (2000). "Uncovered claims" therefore include both claims that are ineligible for guaranty fund protection in their entirety, and the portion of eligible claims that exceeds the dollar cap.

uncovered claims for the same estate assets; substituting the guaranty funds' claims for the policyholder claims paid off by guaranty funds leaves the uncovered policyholder claims with exactly the same assets to divide--and, in addition, gives the covered claims the benefit of speedy and assured payment which would not exist without the guaranty fund scheme. This is all true but it rests on the district court's own "in the absence" predicate.

The argument of the United States depends not on looking at the scheme as a whole (and contrasting its absence) but with comparing the existing scheme, in the short run, first with and then without a priority for the funds. Even on this basis, it is not clear that matters would work out as the United States supposes.[5] In any event, the short-run perspective is inadequate: the guaranty fund scheme, which protects policyholders, is itself heavily dependent in a practical sense on priority reimbursement out of the estate assets. A clever argument cannot overcome this reality.

The Time Bar. This brings us to the second major issue in this case. As already explained, the United States filed a number of claims against the estate, some of which were filed after the one-year state deadline for claims in the liquidation proceeding. Regarding itself as bound by a prior First Circuit precedent, the district court held that this deadline was not binding on the United States. On cross appeal the Commissioner asks us to reexamine this precedent and to hold that the McCarran-Ferguson Act protects the one-year deadline.

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[5] If the intended priority for guaranty funds over the United States were forbidden, a Massachusetts court might well read state law to treat subrogated claims by the funds as claims of the policyholder: a departure from the wording of the statute but true to its aim. The United States would then have to argue that this recasting of claims also violates the Federal Priority Act--a hurdle it might or might not be able to leap.

A word of background will be helpful. The Supreme Court long ago held that (presumptively) claims of the United States as sovereign cannot be defeated by state statutes of limitations. United States v. Summerlin, 310 U.S. 414, 417 (1940). We say "presumptively" because Congress can provide otherwise. The Commissioner's position is that the McCarran-Ferguson Act does make the Massachusetts deadline apply to claims of the United States because that deadline, like the priority provision protecting guaranty funds, is "for the purpose of regulating the business of insurance."

This is certainly so in the lay sense of the phrase but, in Garcia v. Island Program Designer, Inc., 4 F.3d 57 (1st Cir. 1993), we held that it was not so in the specialized sense that the phrase is used in the McCarran-Ferguson Act, even with the gloss of Fabe. Dealing with a counterpart deadline--Garcia involved a Puerto Rico statute governing insurance company liquidations--then-Chief Judge Breyer ruled that the deadline was "neither directed at, nor necessary for, the protection of policyholders . . . . The provision helps policyholders only to the extent that (and in the same way as) it helps all creditors." Id. at 62.

We are bound by Garcia which can be overturned only by this court sitting en banc. United States v. Wogan, 938 F.2d 1446, 1449 (1st Cir.), cert. denied, 502 U.S. 969 (1991). The Commissioner argues--perhaps overargues--that a few courts elsewhere have not agreed with Garcia,[6] but it would

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[6] The Commissioner primarily relies on Munich American Reinsurance Co. v. Crawford, 141 F.3d 585 (5th Cir.), cert. denied, 525 U.S. 1016 (1998); Stephens v. American International Insurance Co., 66 F.3d 41 (2d Cir. 1995); Boozell v. United States, 979 F. Supp. 670 (N.D. Ill. 1997); Clark v. Blue Cross Blue Shield of West Virginia, Inc., 510 S.E.2d 764 (W. Va. 1998). Of these, only Clark, id. at 785-86, and Boozell, 979 F. Supp. at 677-79, directly criticized Garcia. Stephens cited Garcia with apparent approval on a related point, 66 F.3d at 45, while Crawford merely

require more than that for the panel to overturn Garcia. See Williams v. Ashland Eng'g Co., 45 F.3d 588, 592 (1st Cir.), cert. denied, 516 U.S. 807 (1995). She also argues that we have sub silentio overturned Garcia by failing to cite it in other cases where it could have been invoked; but a review of the cases shows that in one instance only private claims were at issue and the other cases protected the claims of the United States on other grounds.[7]

Nevertheless, it is useful to say a word about Garcia, partly to stress that it is consistent with the view we take of Fabe in the present case. Conceptually, Fabe draws the line at state law that focuses protection on policyholder claims, either directly or indirectly (where the connection is strong, as with the priority for the subrogated claims). 508 U.S. at 508-09. An early bar date for United States claims has only a limited effect on policyholders--who have priority anyway--and equally or primarily helps other general creditors.

Thus, Garcia correctly applied Fabe. The problem with letting the United States file late claims is not that this is at odds with the McCarran-Ferguson Act. Rather, giving the United States an open-ended exemption from deadlines is (in the liquidation context) simply terrible public policy and was almost

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noted a potential difference in approach between Stephens and Garcia, 141 F.3d at 592. In addition, Davister Corp. v. United Republic Life Ins. Co., 152 F.3d 1277, 1281 n.5 (10th Cir. 1998), also approvingly cited Garcia.

[7] See Mercado-Boneta v. Administracion del Fondo de Compensacion al Paciente, 125 F.3d 9 (1st Cir. 1997) (upholding a Puerto Rican bar date with respect to private policyholders); United States v. R.I. Insurers' Insolvency Fund, 80 F.3d 616 (1st Cir. 1996) (holding that the Medicare Secondary Payer provision specifically related to insurance and trumped McCarran-Ferguson reverse preemption); Villafane-Neriz v. FDIC, 75 F.3d 727 (1st Cir. 1996) (holding that the federal statute drawn in question did not impair state law, thus avoiding McCarran-Ferguson reverse preemption).

certainly not the result of any considered judgment by Congress. Given the connection of the problem with the efficient conduct of judicial proceedings (i.e., liquidation), we think it may be useful to Congress for us to explain briefly why the policy ought to be reconsidered.

Because of the Federal Priority Act, the defunct insurance company cannot be fully liquidated, and its assets fully distributed, until all claims of the United States are satisfied to the extent that remaining assets permit. If there is no deadline for United States' claims, the Commissioner--who is personally liable for ignoring the Federal Priority Act, 31 U.S.C. § 3713(b)--cannot ever pay off creditors with lower priorities, unless she can wrangle a waiver from the United States. Indeed, this is merely one example of the problems that may be caused by the lack of a deadline and by no means a complete catalogue.

No doubt the United States may give a waiver but here, even after a decade, a final waiver has not been provided. True, too, the United States is likely limited as to some of its claims by a patchwork of federal statutes of limitations; but they vary from claim to claim. E.g., 28 U.S.C. § 2415 (2000) (general six-year statute of limitations for contract-based actions for money damages brought by the United States); 26 U.S.C. § 6501 (2000) (three-year statute of limitations on income taxes). In a complicated liquidation, understandably the Commissioner is loath to rely on such statutes--particularly because she does not know exactly what claims the United States has so far failed to discover and assert. Some uniform limit is plainly needed.

Congress could easily fix the problem, as it has already done for ordinary bankruptcies. 31 U.S.C. § 3713(a)(2) (excepting Title 11 from the Federal Priority Statute); 11 U.S.C. § 502(b)(9) (2000); Fed. R. Bankr. P. 3002(c)(1). But this is a matter for the legislature, not the courts. Among other reasons, the

optimal answer might well be something other than letting each state fix its own quite short limit for federal claims. The United States, with its vast array of agencies and activities, might well deserve more than one year, cf. Fed R. App. P. 4(a)(1)(A), (B), but it does not need forever.

In our view, the two state and district court cases that do disagree with Garcia are not persuasive in their reasoning. See Boozell, 979 F. Supp. at 677-78; Clark, 510 S.E.2d at 785-86. Rather, they implicitly reflect the pressure created where the conduct of an already complicated state proceeding is further complicated by a seemingly unlimited in time (and therefore irrational) veto possessed by the United States. If the Department of Justice cannot find time to draft a proper amendment, it will simply encourage judicial self-help, however misguided that may be.

Intervention. Finally, we consider the questions raised by the would-be intervenors, a number of state guaranty funds who were denied intervention by the district court and now appeal from that ruling. Regardless of whether review might have been sought earlier, it is well settled that the final judgment brings up intermediate rulings such as rulings on intervention. See, e.g., Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 375-77 (1987) (noting the right of would-be intervenors to appeal from an adverse final judgment). We sustain the district court's rulings but permit intervention at this time and in this court on a going-forward basis.

The would-be intervenors unquestionably have an enormous practical stake in this case. The guaranty funds are liable, under their own state laws, to reimburse numerous policyholders of American Mutual who bought policies in their respective states. Similarly their priority in claiming Massachusetts assets of the estate depends on whether the Commissioner or the United States prevails on these appeals.

Thus, the would-be intervenors meet the first two requirements for intervention as of right: an interest in the matter in controversy and a practical threat to that interest. Fed. R. Civ. P. 24(a)(2). The difficulty is the qualification: "unless the applicant's interest is adequately represented by existing parties." Id. The district court found that the interests of the guaranty funds were adequately represented by the Commissioner whose position on the priority and time bar issues is the same.

Adequacy is presumed, although rebuttably so, where a government agency is the representative party. See Pub. Serv. Co. v. Patch, 136 F.3d 197, 207 (1st Cir. 1998) (requiring a "strong affirmative showing" that the agency is not adequately representing the would-be intervenor's interests). The guaranty funds argue that the Commissioner is acting primarily in a private or personal capacity, given the threat of personal liability under the Federal Priority Act. But even if this were a pertinent distinction, which is open to doubt, it would not govern here: the Commissioner has a pertinent governmental interest in defending state statutes that benefit Massachusetts policyholders.

No concrete reason is suggested why the Commissioner's representation is inadequate and, in fact, the common position of the guaranty funds and the Commissioner has been ably presented. Thus, intervention as of right was properly denied. The district court could, of course, have permitted permissive intervention but its discretion on that score is great. Daggett v. Comm'n on Governmental Ethics & Election Practices, 172 F.3d 104, 113 (1st Cir. 1999). There is no basis for saying it was abused, especially where the issues were legal and amici briefs were permitted.

The would-be intervenors candidly admit that their present concern is with the future. Rehearing en banc might be sought as to Garcia and the possibility

exists of Supreme Court review. Given the magnitude of the stakes and the helpful advocacy the funds have provided to us, we choose in these unusual circumstances to exercise our own discretion to allow the guaranty funds to intervene in the case at this time on a going-forward basis. Cf. Daggett, 172 F.3d at 112.

For the reasons stated, the decision of the district court is affirmed. The alternative request of the guaranty funds to intervene in this case is granted as of the release date of this decision. Each side shall bear its own costs in this court.

It is so ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
Civil Action No. 00-12417-DPW
LINDA RUTHARDT, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF INSURANCE OF THE COMMONWEALTH OF MASSACHUSETTS and PERMANENT RECEIVER OF AMERICAN MUTUAL LIABILITY INSURANCE COMPANY and AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,
Plaintiff,
v.
UNITED STATES OF AMERICA, AND JOHN ASHCROFT IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES,
Defendants.

MEMORANDUM AND ORDER
September 27, 2001

The Massachusetts Commissioner of Insurance, who has been appointed under Massachusetts law to serve as the Permanent Receiver of two insolvent insurance companies (the "Receiver"), brings this declaratory judgment action seeking to establish that the general federal claim priority statute, 31 U.S.C. § 3713, does not preempt certain provisions of the Massachusetts statute governing the priority of claims for insurance liquidation proceedings, Mass. Gen. Laws ch. 175 §§ 180A-180L. Specifically, the Receiver requests a declaration (A) in Count II, that she may pay the claims of insurance guaranty funds prior to non-policyholder claims by the federal government and (B) in Count I, that federal government claims are subject to the March 9, 1990 filing deadline set by the state receivership court.

The parties[1] have filed dispositive motions[2] that turn upon the anti-preemption presumption of the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq., which provides that

> No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012(b).

I. BACKGROUND

A. The Parties

American Mutual Liability Insurance Company ("AMLICO") and American Mutual Insurance Company of Boston ("AMI") (collectively "the Companies") are mutual insurance companies organized and existing under the laws of the Commonwealth of Massachusetts. The Companies primarily wrote

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[1] I have permitted a number of state insurance guaranty funds, who sought intervention in support of the Receiver, to participate in this litigation as amicus curiae. The National organization of Life and Health Insurance Guaranty Associations was also granted leave to file an amicus brief. I will, however, decline the request of these guaranty funds for formal intervention before entry of judgment, for the reasons set forth in Section IV, infra.

[2] The Receiver has chosen to proceed by a motion for summary judgment, bringing to my attention certain factual matters, which do not appear to be disputed, beyond the pleadings. The United States, contending that the issues are essentially questions of law adequately framed by the complaint, has chosen to proceed by motion to dismiss. Because I have considered, with the knowledge of the parties, materials beyond the pleadings -- including submissions by the proposed intervenors -- I will dispose of this case by summary judgment.

workers' compensation, general liability, and automobile lines of insurance for both commercial and personal policyholders.

Linda Ruthardt is the Commissioner of Insurance for the Commonwealth of Massachusetts. In this capacity, she serves as the Permanent Receiver of the Companies.[3] As receiver, the Commissioner has exclusive authority to recover all assets of the Companies.

B. Guaranty Funds

Every state has an insurance guaranty fund to provide protection for insureds and claimants residing in that state in case of insurer insolvency. A guaranty fund is an association of all insurers licensed to transact business in the state of the guaranty fund.

In the event that an insurer becomes insolvent, guaranty funds become obligated to pay claims covered by the insurer's property and casualty insurance policies. Only covered claims are paid by guaranty funds; the funds do not pay non-policy claims or general creditor claims. The funds pay each covered claim up to the lesser of policy limits or a specified dollar cap (excepting workers' compensation claims, which are not capped). The dollar cap for most funds is $300,000.

In order to pay the claims of an insolvent insurer, each guaranty fund assesses its member insurers. Insurers recover assessments through higher insurance rates and premiums, and in certain states through premium tax offsets or policy surcharges.

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[3] At the time the liquidation order was issued, Roger Singer was Commissioner of Insurance. When Linda Ruthardt was appointed Commissioner of Insurance, she was substituted as Receiver of the Companies by an order of the receivership court on September 3, 1993 .

Guaranty funds also may pursue recoveries against the estates of insolvent insurers, which reduces the need for assessments on member insurers and thus the need for increased rates and premiums. Any policyholder recovering from a guaranty fund is deemed to have assigned to the fund her right to recover from the insolvent insurer's assets, as well as the priority status she would have had without the guaranty fund. Massachusetts law provides that in a state liquidation proceeding, the claims of guaranty funds are afforded a priority equal to policyholders and ahead of non-policyholder claims by the United States government. Mass. Gen. Laws ch. 175 § 180F.

C. Factual History

On March 9, 1989, the Supreme Judicial Court for Suffolk County entered an order of liquidation declaring the Companies insolvent and placing them into receivership. The court appointed the Commissioner of Insurance as Permanent Receiver of the Companies.

As a result of the entry of the liquidation order, claims under the Companies' insurance policies with occurrence dates prior to December 31, 1987 were transferred to the Massachusetts Insurers Insolvency Fund ("MIIF") and other state guaranty funds. All claims under residual market policies and all Massachusetts automobile claims were transferred to guaranty funds regardless of the occurrence date. MIIF and other state guaranty funds have made payments on covered claims under the Companies' insurance policies totaling a reported $673,977,022.[4]

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[4] Altogether, fifty-one property-casualty guaranty funds in forty-six jurisdictions have sought reimbursement for payments made on covered claims under the Companies' insurance policies.

As authorized by Mass. Gen. Laws ch. 175 § 180F,[5] on March 22, 1989, the receivership court entered an order requiring the Companies' creditors to file their claims with the Receiver by March 9, 1990. Approximately 37,000 claims were filed by that date.[6] Various federal agencies submitted claims, both before and after the March 9, 1990 bar date, totaling $636,742 against AMLICO and $5,740 against AMI.[7]

Pursuant to the Early Access Distribution Plan approved by the receivership court on June 22, 1993, four distributions totaling $173,971,732 have been made to eligible insurance guaranty funds in partial reimbursement of their claims against estate assets.[8] On June 1, 1999, the court approved a proposed fifth distribution of $10,125,000 to guaranty funds, but Ruthardt has not made the distribution because the

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[5] Mass. Gen. Laws ch. 175 § 180F provides, in pertinent part, that all claims in any liquidation proceeding "shall be filed on or before the last date fixed by the court for the filing of claims in the domiciliary proceeding."

[6] Of these 37,000 claims, 7,167 were workers' compensation claims, 4,614 were claims under other types of policies, and 10,628 were claims for return of unearned premium on policies canceled because of the liquidation.

[7] By letter dated February 21, 1990, the United States Department of Labor filed claims for $566,736.48 against AMLICO and $5,739.63 against AMI under the Longshore and Harbor Workers' Compensation Act. By letters dated August 21, 1990 and December 4, 1991, the United States Interstate Commerce Commission filed claims against AMLICO totaling $140 for certificates of insurance filed with the Commission. The Environmental Protection Agency filed a claim dated March 6, 1990 in its capacity as a creditor of Stanadyne, Inc., an AMLICO-insured company. Finally, commencing in 1993, various Medicare contractors submitted 45 claims totaling $69,865 relating to Medicare payments for former AMLICO employees or retirees.

[8] The guaranty funds have recovered from estate assets a total of $308,397,257 as of December 31, 1999. As of September 15, 2000, the funds reported approximately 13,737 pending claims.

United States has declined to waive its claims under 31 U.S.C. § 3713 with respect thereof.[9]

On May 14, 1999, Ruthardt filed a motion in the receivership court for approval of a liquidation plan reflecting the distribution priorities established by Mass. Gen. Laws ch. 175 § 180F and providing for denial of late filed claims.[10] She now requests a declaration from this court on these same points. In response, the United States asserts that all federal claims in this liquidation proceeding are entitled to first priority under 31 U.S.C. § 3713, and at least over guaranty fund claims. The United States further asserts that federal claims are not subject to Massachusetts' filing deadline.

II. THE STATE DISTRIBUTION PRIORITIES (COUNT II)

The general federal priority statute, 31 U.S.C. § 3713, entitles federal claims to first priority when "a person indebted to the Government is insolvent and ... an act of bankruptcy is committed." 31 U.S.C. § 3713(a)(1)(A)(iii).

By contrast, the Massachusetts insurance liquidation statute, Mass. Gen. Laws ch. 175 § 180F, accords fourth priority to non-policyholder claims of the United States in insurance liquidation proceedings.[11] Under the state statute, a receiver may

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[9] The United States granted conditional waivers of its claims under 31 U.S.C. § 3713 for the four previous distributions by the Receiver.

[10] This motion is pending the outcome of the instant proceeding. In connection with the motion, the receivership court also submitted four questions of law to the full Supreme Judicial Court. In the Matter of the Liquidation of American Mutual Liability Insurance Company, 434 Mass. 272 (Mass. 2001).

[11] Mass. Gen. Laws ch. 175 § 180F establishes the following order for distribution of claims:

(1) expenses of administration;

make payments to claimants in a particular priority class only if all claimants in higher priority classes have been paid in full or adequate funds have been set aside for such payments. Mass. Gen. Laws ch. 175 § 180F.

A. The Preemption Landscape

Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, federal law ordinarily will preempt a conflicting state law, even where congressional preemptive intent is implicit. See Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 30-31 (1996). However, the McCarran-Ferguson Act provides for a special anti-preemption exemption when state regulation of the "business of insurance" is involved.[12] By its terms, the Act operates to preserve a state statute from federal preemption where: (1) the state statute has been enacted "for the purpose of regulating the business of insurance;" (2) application of the relevant federal statute would "invalidate, impair, or supersede" that state statute; and (3) the federal statute does not itself "specifically relate to the business of insurance." 15 U.S.C. § 1012(b). As restated in United States Dept. of Treasury v. Fabe, 508 U.S. 491, 507 (1993), under the McCarran-Ferguson Act "state laws enacted 'for the purpose of

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(2) claims of policyholders, beneficiaries and insureds and claims of insurance guaranty funds;
(3) claims for return premiums;
(4) claims of the federal government other than those included in class 2 or 3
(5) compensation of employees
(6) claims for taxes and debts due to any state or local government; and
(7) all other claims.

[12] Congress enacted the McCarran-Ferguson Act for the specific purpose of recognizing the states' primary responsibility for regulating the insurance industry. See SEC v. National Sec., Inc., 393 U.S. 453, 458 (1969).

regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise."

It is clear that 31 U.S.C. § 3713 operates to "invalidate, impair, or supersede" the distribution priorities established by Mass. Gen. Laws ch. 175 § 180F. See 15 U.S.C. § 1012(b). By according first priority to all claims of the United States, the federal priority statute necessarily conflicts with assignment of fourth priority to federal non-policyholder claims under the Massachusetts scheme. The United States does not dispute that the McCarran-Ferguson Act inquiry is satisfied in this regard.

The United States also concedes that the Supreme Court made clear in Fabe that 31 U.S.C. § 3713 does not "specifically relate[ ] to the business of insurance" for McCarran-Ferguson purposes. See 15 U.S.C. § 1012(b); Fabe, 508 U.S. at 501.

Consequently, the priority issue in this case will hinge solely upon the remaining element of the McCarran-Ferguson Act inquiry: whether the priority scheme established by Mass. Gen. Laws ch. 175 § 180F, at least to the extent it subordinates federal non-policyholder claims to guaranty fund claims, was enacted "for the purpose of regulating the business of insurance." See 15 U.S.C. § 1012(b).

B. Was the Massachusetts Priority Scheme Enacted "For the Purpose of Regulating the Business of Insurance"?

In addressing a similar conflict between 31 U.S.C. § 3713 and an Ohio statute conferring fifth priority upon federal non-policyholder claims in liquidation proceedings, the Supreme Court in Fabe reasoned that a state statute relating to the actual performance of an insurance contract should be considered enacted "for the purpose of regulating the

business of insurance."[13] 508 U.S., at 503. The Court found that a state statute designed, like the one before it, "to ensur[e] the payment of policyholders' claims despite the insurance company's intervening bankruptcy" is "integrally related to the performance of insurance contracts." Id., at 504. Therefore, in respect of the Ohio statute's assignment of a higher priority to policyholder claims over federal non-policyholder claims, the Court held all three conditions for McCarran-Ferguson Act preservation of the state law to have been met. Id., at 508.

At the same time, the Court took care to emphasize the critical character of the nexus with policyholder claims to its analysis. Thus, it declined to view the Ohio statute in its entirety as a law enacted "for the purpose of regulating the business of insurance" to the degree that particular provisions of the statute were not "'aimed at protecting or regulating this relationship [between insurer and insured], directly or indirectly.'" Id., at 501 (quoting SEC v. National Securities, Inc., 393 U.S. 453, 460 (1969)).

This rejection of an "all-or-nothing approach" led the Court to a parsing of the Ohio statute's distribution priorities.[14] With respect to the Ohio statute's prioritization of administrative expenses over federal non-policyholder claims, the Court denied 31 U.S.C. § 3713 preemptive effect, finding the preference "reasonably necessary to further the goal of protecting policyholders."[15] 508 U.S., at 509. But the Court

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[13] In so doing, the Court affirmed but did not consider itself overly restricted by the criteria for determining what constitutes the "business of insurance" set forth in Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982).

[14] The Ohio statute ranked federal claims behind administrative expenses, employee wage claims, policyholder and guaranty fund claims, and general creditor claims. 508 U.S. at 497 n. 2.

[15] Without payment of such expenses, the Court reasoned, "liquidation could not even commence." 508 U.S. at 509.

refused to read the McCarran-Ferguson Act as similarly exempting from federal preemption the Ohio statute's prioritization of the claims of employees and general creditors. Acknowledging that "every preference accorded to the creditors of an insolvent insurer ultimately may redound to the benefit of policyholders by enhancing the reliability of the insurance company," the Court nevertheless found such a connection to be "too tenuous" to escape preemption. Id.

Thus, under Fabe, I may consider the distribution priorities under Mass. Gen. Laws ch. 175 § 180F to have been enacted "for the purpose of regulating the business of insurance" - - and hence, exempt from federal preemption -- only insofar as they are aimed with some precision at protecting or regulating policyholders.

The United States contends that Massachusetts' prioritization of guaranty fund claims over federal non-policyholder claims does not function to protect policyholders because it "permits the enormous claims of state insurance guaranty funds to compete as claims of equal rank with the claims of policyholders (including the federal government) for the assets of a failed insurance company, by allowing the claims of the guaranty funds to share in the same creditor class as policyholders." By so doing, the argument goes, the distribution priority "virtually ensures that policyholders will not receive payment on their claims against an insolvent insurer," because policyholders will receive far smaller distributions than if the guaranty funds occupied a lower priority class. Thus, the United States concludes, at least Massachusetts' prioritization of guaranty fund claims over federal non-policyholder claims ought to be preempted by the federal priority statute.[16]

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[16] I note that Fabe did not specifically address the question of guaranty fund claims, despite the fact that the Ohio statute in question also accorded such claims equal status to

The United States raised the same argument unsuccessfully in Boozell v. United States, 979 F. Supp. 670 (N.D. Ill. 1997), where it challenged the Illinois Insurance Liquidation Law's distribution priorities.[17] 979 F. Supp, at 678. The district court there held that guaranty funds are, by their very nature, "designed to protect policyholders of an insolvent insurer" because they are obligated to pay the claims of policyholders of insolvent insurers, who are then deemed to have assigned their rights of recovery to such funds.

The contentions of the United States can be put in perspective by focusing on the way in which MIIF, the primary guaranty fund in Massachusetts, is designed to operate. MIIF is required to pay all Massachusetts claims arising out of and within the coverage of relevant policies issued by an insurer which becomes insolvent. Mass. Gen. Laws ch. 175D, § 1(2). MIIF stands in the shoes of the policyholders who recover from the MIIF. These policyholders are deemed to have assigned their rights under the policy to the fund to the extent of their recovery. Mass. Gen. Laws ch. 175D § 8(l). In recovering from an insolvent insurer's estate, the MIFF then assumes a priority equal to that which policyholders who have recovered from the fund would have enjoyed in its absence. Mass. Gen. Laws ch. 175D § 8(2). And in doing so, MIIF recovers only to the extent the policy holders it has paid could.

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policyholder claims. See Fabe, 508 U.S. at 497 n. 2. On remand, the trial court struck down the statute in its entirety, concluding that the portions of the statute preempted by the Supreme Court's decision in Fabe could not be severed from the remainder of the Ohio priority scheme. Duryee v. Dept. of Treasury, No. 77-1205 (S.D. Ohio Aug. 15, 1995).

[17] The Illinois Liquidation Law assigns sixth priority to non-tax federal claims against insolvent insurers. It assigned fourth priority to claims by policyholders and guaranty funds. 979 F. Supp. at 677-78.

Under this regime, guaranty funds benefit certain policyholders by expediting the resolution and payment of claims. The funds begin paying claims immediately after an insolvency and continue doing so even after applicable time bars have run. By contrast, a state appointed receiver generally cannot distribute any estate assets until the identity and amount of all claims are known.

Guaranty funds further benefit certain policyholders by providing greater recoveries than would otherwise have been available from estate distributions in liquidation proceedings. Regardless of the extent of an insolvent insurer's assets, the funds pay each covered claim up to the lesser of policy limits or a $300,000 dollar cap (again excepting workers' compensation claims, which are not capped). By contrast, the Receiver estimates that in the particular liquidation proceeding at issue here, the insolvent companies' assets on their own would have been sufficient only to reimburse workers' compensation policyholders partially (albeit substantially), and other policyholders not at all. It is only because of guaranty funds that almost all workers' compensation claims have been paid in full, and other claimants reimbursed up to statutory limits (typically $300,000).

Put in this perspective, the contention of the United States that guaranty fund claims create new competition with policyholder claims is specious. In the absence of guaranty funds, those policyholder claims that such funds currently reimburse would remain directly in the competitive mix, potentially reducing pro tanto the available assets of the estate. The guaranty funds thus benefit policyholders, even if the funds' priority status in liquidation proceedings bestows a somewhat indirect benefit to policyholders who have passed their claims onto the guaranty funds. In this regard, I consider guaranty funds to occupy a critically different position vis-à-vis policyholder interests than do, for example, the

general creditors of an insolvent insurer. Guaranty funds themselves are integral to the general "goal of protecting policyholders." They do so with precision.[18] Consequently, I am not prepared to dismiss their priority status under Mass. Gen. Laws ch. 175 § 180F as not "reasonably necessary to further" that goal.

I find no meaningful question that guaranty funds are designed to protect and benefit certain policyholders of an insolvent insurer by affording prompter and potentially larger payments on claims than would be possible if those policyholders were required to wait for a receiver's distributions.[19] Therefor, I find that the priority accorded the claims of guaranty funds over federal non-policyholder claims in insurance liquidation proceedings under Massachusetts law to be a provision enacted "for the purpose of regulating the business of insurance," and accordingly conclude it is saved by the McCarran-Ferguson Act from preemption under the general federal priority statute, 31 U.S.C. § 3713.

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[18] I note that the Ohio statute in dispute before the Court in Fabe also accords the claims of guaranty funds equal priority with those of policyholders. Although concededly the question was not framed as such, the Supreme Court in Fabe made no suggestion that this prioritization over federal non-policyholder claims goes beyond the "purpose of regulating the business of insurance," as it found to be the case with respect to employee wage and general creditor claims. Indeed, Fabe necessarily recognized the role played by guaranty funds as benefitting policyholders when it upheld the first priority to administrative costs, a category which included "the reasonable expenses of a guaranty association . . . in handling claims." See Fabe, 508 U.S. at 497 n. 2.

[19] I note, moreover, they achieve that result without obtaining greater rights in liquidation proceedings than other policyholders.

III. THE STATE FILING DEADLINE (COUNT I)

The Receiver also requests a declaration that federal claims are subject to the March 9, 1990 deadline set by the state receivership court pursuant to Mass. Gen. Laws ch. 175 § 180F. The United States does not contest that certain of its claims were brought after this March 9, 1990 deadline. However, it does contend, first, that federal claims generally are not bound by state rules of limitation, see United States v. Summerlin, 310 U.S. 414 (1940), and, second, that 31 U.S.C. § 3713 operates to preempt Massachusetts law in this regard, because the state filing deadline was not enacted "for the purpose of regulating the business of insurance." See 15 U.S.C. § 1012(b).

A. State Impairment of Federal Claims

The United States argues that the imposition of any time limitation on federal claims is prohibited by the principle that the United States is not "bound by state statutes of limitation or subject to the defense of laches in enforcing its rights." United States v. Summerlin, 310 U.S. 414, 416 (1940) (internal citations omitted). The Court in Summerlin explained that when the United States asserts a claim in its sovereign capacity, "it cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute putting a time limit upon enforcement." 310 U.S. at 417 (internal citation omitted).

The general principle expressed in Summerlin is well-established. See, e.g., Bresson v. Commissioner of Internal Revenue, 213 F.3d 1173, 1175-77 (9th Cir. 2000) (a valid federal claim cannot be "cut off" by a state statute of limitations, so long as acquired before the limitations period has run); see also Brown v. Coleman, 318 Md. 56 (Md. 1989) (federal priority

cannot be superseded or impaired by state law). However, its preemptive effect here (through the general federal priority statute, 31 U.S.C. § 3713) cannot overcome the particular niche for state authority carved out by the McCarran-Ferguson Act, which was enacted by Congress five years after Summerlin was decided. Thus, despite the enduring general vitality of the Summerlin principle, the United States will be deemed to have chosen to become subject to the state filing deadline in this case to the degree the McCarran-Ferguson Act protects such rules.

B. Was the Massachusetts Filing Deadline Enacted "For the Purpose of Regulating the Business of Insurance"?

It bears re-emphasizing that Fabe holds a state law is deemed to have been enacted "for the purpose of regulating the business of insurance" under the McCarran-Ferguson Act only to the extent that it regulates or protects policyholders. 508 U.S. at 508, 509 n. 8. Thus, I must determine if Massachusetts' filing deadline in insurance liquidation proceedings in fact serves to regulate or protect policyholders.

The First Circuit, shortly after Fabe was handed down, specifically considered whether such a state deadline was enacted to regulate the business of insurance. Garcia, 4 F.3d at 60-62. At issue in Garcia was a Puerto Rico law permitting the Insurance Commissioner to set a claims filing deadline, and to delay payment of any late claims until all timely-filed claims "have been paid in full with interest." Id. at 60-61 (internal quotation omitted). One year after the deadline established for an insurance insolvency,[20] the IRS filed a claim representing federal tax liens on the

[20] Garcia involved the liquidation of a health maintenance organization. 4 F.3d at 58.

insolvent company's assets, and sought priority payment pursuant to the federal priority statute. Id.

Then Chief Judge Breyer concluded that the federal priority statute did preempt the state filing deadline, reasoning that the state provision "cannot be said to directly 'regulate[ ] policyholders,' for it is neither directed at, nor necessary for, the protection of policyholders, as the [Fabe] Court required." Id. at 62. He explained that the state filing deadline was not directed at the protection of policyholders, insofar as it "helps policyholders only to the extent that (and in the same way as) it helps all creditors."[21] Id. He added that the deadline was not necessary for the protection of policyholders, noting that without it, "liquidation would still prove manageable. At worst, the trustee's job would become slightly more difficult," in contrast to the payment of administrative expenses, recognized by Fabe as "necessary to protect policyholders, . . . because [otherwise], liquidation might never occur." Id. On the whole, the Garcia court found the state filing deadline in that case to provide policyholders with "only indirect, speculative benefit of the kind that the Fabe Court found far too tenuous to prevent pre-emption." Id.

Garcia has not met with universal acceptance. The District Court in Boozell, for example, "expressly" rejected Garcia and its narrow reading of Fabe, 979 F. Supp. at 678. Other circuits have politely questioned whether Fabe in fact mandates narrow parsing of state insurance statutes, of the sort engaged in by the court in Garcia, to determine which provisions specifically protect policyholders. See, e.g., Munich American Reinsurance Co. v. Crawford, 141 F.3d 585, 592 (5th Cir. 1998) (acknowledging that, under Fabe, "a statute may require parsing to determine the extent of its pre-

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[21] "That is to say, by penalizing late-filers, the Commonwealth provision may bring about more speedy, orderly liquidation proceedings, thereby (perhaps) reducing the risks (and costs) of extending credit to the company." Id.

emptive power under the McCarran-Ferguson Act," but noting that "the Court stopped short of directing that this approach be taken in every case," such that, "Fabe's holding in this respect is simply unclear."); see also Stephens v. American Int'l Ins. Co., 66 F.3d 41, 44-45 (2d Cir. 1995) (anti-arbitration provision contained in Kentucky Liquidation Act upheld as "simply one piece" of Act's overall purpose of "assuring that an insolvent insurer will be liquidated in an orderly and predictable manner.")[22]

A focused critique was presented by the court in Clark v. Blue Cross Blue Shield of West Virginia, 510 S.E.2d 764 (W.Va. 1998), which specifically rejected Garcia's logic that a state filing deadline in insurance liquidation proceedings does not, considered on its own merits, qualify as protecting policyholders for McCarran-Ferguson Act purposes. The state court in Clark held that a West Virginia filing deadline on claims against insolvent insurance companies is not preempted by the federal priority statute, because such a deadline assures that policyholder claims "will be handled in a timely and orderly fashion," and because it "reduc[es] the administrative costs of liquidation" (thereby preserving more estate assets to be distributed to policyholders on their claims). 510 S.E.2d, at 784-85.[23]

The record before me suggests the Garcia panel may have understated the disruption which an

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[22] The Tenth Circuit, in upholding a Utah statute staying proceedings against an insolvent insurer against preemption by the Federal Arbitration Act, distinguished Garcia without questioning it by observing that the filing deadline at issue in Garcia "would have applicability in any form of debt liquidation proceeding and it is not in any way peculiar to the business of insurance." Davister Corp. v. United Republic Life Ins. Co., 152 F.3d 1277, 1281 n.5 (10th Cir. 1998).

[23] In concluding its analysis, the Clark court observed that the Garcia decision "has not been followed by any other court ... [and] has been criticized as interpreting Fabe too narrowly." Id., at 785.

open-ended opportunity for federal government claims has upon insurance liquidation proceedings. Absent a deadline for claims applicable to all creditors, a receiver will not be willing to make a final distribution because the prospect of unanticipated claims would render impossible a final determination.[24] The result would be to require known policyholder creditors to wait indefinitely for reimbursement.[25]

Since Garcia, the First Circuit itself has recognized the practical need for a claims filing date in insurance company liquidation proceedings, and acknowledged that a bar date serves the "strong interest in rapidly resolving and quantifying all claims" against an insolvent insurer. See Mercado-Boneta v. Administracion del Fondo de Compensacion al Paciente, 125 F.3d 9, 17 (1st Cir. 1997). The court there explained:

> If the Insurance Commissioner were required to accept claims against the liquidated PCFA indefinitely that would clearly contravene the legitimate legislative goal of finality, and could well delay distribution of funds to any claimant. In addition to the administrative difficulties involved in permitting the continued filing of claims against PCFA, due to the limited availability of funds, known claimants

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[24] Ruthardt notes that if she distributes assets upon approval of a receivership court, and later filed claims of the United States are deemed valid, she might face personal liability under 31 U.S.C. § 3713 (b) .

[25] Ruthardt acknowledges that timely and orderly distribution of funds will benefit all creditors in a liquidation proceeding (not just policyholders), but contends that the primary benefit will accrue to policyholders, insofar as the vast majority of claims against an insolvent insurer's estate are made by policyholders and guaranty funds under statutory assignments of policyholder rights.

> might be required to await the filing of future claims before they could collect on their own. Absent a claims bar date, neither the affairs of PCFA nor the interests of pending claims could be finalized. ... We recognize ... the legislature's legitimate purpose in setting a claims bar date, and find that it was reasonable and necessary under the circumstances.

Id., at 17-18.

Ruthardt urges me to further consider that the First Circuit has not cited Garcia in three subsequent decisions addressing either insurer receivership bar dates or the McCarran-Ferguson Act (citing Mercado-Boneta, 125 F.3d at 17-18, United States v. Rhode Island Insurers Insolvency Fund, 80 F.3d 616, 619 (1st Cir. 1996), and Villafane-Neriz v. FDIC, 75 F.3d 727, 735 (1st Cir. 1996)). The suggestion apparently is that Garcia has been abandoned sub silentio.

To be sure, there are distinctions between Garcia and subsequent cases. The state court in Clark, for example, placed emphasis on the fact that the West Virginia deadline did not serve to prohibit late-filed federal claims absolutely, but merely subordinated such claims in distribution priority to timely-filed claims. 510 S.E.2d, at 778. By contrast, Mass. Gen. Laws ch. 175 § 180F appears to contemplate an absolute bar against late-filed claims.[26] Mercado-Boneta, to take another example, involved the application of a claims filing deadline to a private party, rather than to the federal government. 125 F.3d 9. Neither the federal priority statute nor the

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[26] The United States notes that while Mass. Gen. Laws ch. 175 § 180F does not explicitly state that late-filed claims are invalidated, the Complaint and its attachments indicate that such claims are not processed by the receiver.

applicability of the McCarran-Ferguson Act were at issue in that case.

Such distinctions, however, do not seem to make a meaningful difference. There is a compelling argument for the proposition that benefits are accorded policyholders by a state filing deadline in liquidation proceedings. In particular, Garcia seems to have been insufficiently sensitive to the fact that late-filed federal policyholder claims may substantively, and rather directly, interfere with the timely and orderly distribution of funds to general policyholder creditors.

Nevertheless, because Garcia remains controlling law in this circuit, I am bound by its holding. Under any fair reading of Garcia, I am obligated to find that the Massachusetts filing deadline in insurance liquidation proceedings was not enacted "for the purpose of regulating the business of insurance," and as such is preempted by the federal priority statute, 31 U.S.C. § 3713. It is the prerogative of the Court of Appeals and not the District Court to overrule precedent established by an appellate panel. Cf. United States v. Hatter, 121 S.Ct. 1782, 1790 (2001). Indeed, it is apparently the First Circuit en banc, rather than simply another First Circuit panel, which has that prerogative with respect to Garcia United States v. Roth Chhien, No. 00-2230, slip op. at 19 (1st Cir. September 24, 2001) (holding "a prior panel decision inviolate absent either the occurrence of controlling intervening event (e.g., a Supreme Court opinion on the point; a ruling of the circuit, sitting en banc; or a statutory overruling), or, in extremely rare circumstances, where non-controlling but persuasive case law suggests such a course"). Lacking the authority to reject Garcia, I must apply it and give judgment on Count I to the United States.

IV. MOTION TO INTERVENE

As noted, see note 1, supra, certain state insurance guaranty funds and associations (the "Guaranty Funds")[27] have moved to intervene in this proceeding in further defense of Mass. Gen. Laws ch. 175 § 180F against federal preemption. The Guaranty funds seek essentially the same declaration sought by the Receiver: that (1) the Guaranty Funds' claims to the assets of the Companies' estates are entitled to priority over non-policyholder federal claims, and (2) any federal claims to such assets are subject to the March 9, 1990 deadline set by the state receivership court. (Guaranty Funds' Compl. ¶¶ 1-2.)

A. Intervention as of Right

Intervention as of right is governed by Fed. R. Civ. P. 24(a), which provides that:

> Upon timely application anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24 (a) (2).

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[27] These are guaranty funds and associations from Alabama, California, Connecticut, the District of Columbia, Illinois, Louisiana, Maine, Massachusetts, Missouri, Nebraska, Nevada, New Hampshire, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, and Virginia.

To satisfy the requirements of Rule 24(a)(2), a party must therefore (1) make a timely application; (2) demonstrate an interest relating to the property or transaction which is the subject of the action; (3) show that disposition of the action threatens to impair or impede its ability to protect that interest; and (4) show that existing parties inadequately represent its interest. Public Service Co. of New Hampshire v. Patch, 136 F.3d 197, 204 (1st Cir. 1998). The First Circuit has emphasized that in the evaluation of asserted claims to intervention as of right, these four elements ought to "be read not discretely, but together, and always in keeping with a commonsense view of the overall litigation." Id. (citation omitted). At the same time, all four elements need to be met: "failure to satisfy any one of them dooms intervention." Id.

In this case, the United States does not challenge the timeliness of the Guaranty Funds' motion to intervene.[28] Similarly clear are the Guaranty Funds' interest in the subject matter of the action, as well as the potential impairment of their ability to protect that interest. With claims exceeding $225 million in the American Mutual estate alone, the Guaranty Funds have precisely the sort of direct interest in the distribution of the Companies' assets that is required. See id., 205-06; Conservation Law Foundation of New England, Inc. v. Mosbacher, 966

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[28] The Receiver's Complaint was filed on November 22, 2000 and the Guaranty Funds sought intervention on February 2, 2001. Not only is this delay minimal, but I note that the motion to intervene further satisfies the additional criteria the First Circuit has set forth for determining timeliness: (1) no prejudice will result to the existing parties because of the delay; (2) given the economic interests of the would-be intervenors, the possibility that they will suffer prejudice if not allowed to intervene merits consideration; and (3) there do not appear to be any unusual circumstances militating against intervention. See Tutein v. Daley, 43 F.Supp.2d 113, 126-27 (1st Cir. 1999); Culbreath v. Dukakis, 630 F.2d 15, 20-24 (1st Cir. 1980).

F.2d 39, 42 (1st Cir. 1992). And given that the Companies' assets are insufficient to satisfy every creditor, the potential that the federal priority statute preempts the Massachusetts distribution scheme necessarily will impact the Guaranty Funds' recovery in the liquidation proceeding.[29]

Whether the Guaranty Funds have a right to intervene hinges, therefore, on the fourth element of Rule 24(a)(2): the adequacy of representation by existing parties. The Supreme Court has said that would-be intervenors need only make a minimal showing in this regard, and only to the effect that representation may be inadequate (not that it actually is). Trbovich v. United Mine Workers, 404 U.S. 528, 538 n. 10 (1972) (cited in Maine v. Director, United States Fish and Wildlife Service, 2001 WL 963707 (1st Cir. 2001)). At the same time, that showing must include "some tangible basis to support a claim of purported inadequacy." Patch, 136 F.3d, at 207. Furthermore, this "burden of persuasion is ratcheted upward" when a private party wishes to intervene to defend a public act which the relevant governmental body is itself defending. Id.; Maine, 2001 WL 963707, at 5-6.

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[29] In this connection, the United States suggests that the Guaranty Funds will suffer no adverse economic impact from a judgment that the Massachusetts distribution scheme is preempted, insofar as any failure to recover from the Companies' estates will be compensated for by assessments on member insurers. I find this argument too conditional for purposes of the Rule 24(a) inquiry. It overlooks, moreover, the degree to which fuller reliance on such assessments would affect functioning of the Guaranty Funds, and certainly does not account for the vigor with which the Guaranty Funds have pressed their case here. It merits emphasis that this analysis in no way draws on the Guaranty Funds' further contention that my decision in this action will have a stare decisis effect upon all other pending and future insurer insolvency proceedings. The judgments of this court are not binding in other jurisdictions; they serve as no more than persuasive authority to other courts that may look to them for guidance.

Nevertheless, in keeping with its "common-sense" approach intervention, the First Circuit has suggested some grounds upon which a court might possibly question the adequacy of such a governmental defense, particularly in the regulatory context, vis-à-vis private interests. None of those grounds are applicable here. The Guaranty Funds were not previously engaged in an adversary relationship with the Commissioner regarding the distribution scheme in insurance insolvency proceedings. See id., at 7-8. Nor is there any significant sense in which the interests of the Commissioner and the Guaranty Funds currently diverge. See id. It may be true that the Commissioner has less personal economic interest in the outcome of this action, but her defense of Massachusetts' distribution scheme has been well developed and vigorous. Not only is it the case that Mass. Gen. Laws ch. 175 § 180F benefits Massachusetts policyholders generally, but the Commissioner has a personal stake in timely and orderly liquidation proceedings. And in fact, the Commissioner has proved "ready, willing, and able to vigorously defend" the Massachusetts law. United Nuclear Corp. v. Cannon, 696 F.2d 141, 144 (1st Cir. 1982). This full-scale defense, coupled with the Guaranty Funds' participation as amici, has rendered the Funds unable to identify any legal argument or evidence that has been kept from this court by virtue of their exclusion as parties. See Mass. Food Assoc. v. Mass. Alcoholic Beverages Control Comm., 197 F.3d 560, 567 (1st Cir. 1999).

The Guaranty Funds urge one last basis for a finding of inadequacy. They suggest that the Commissioner might decide not to appeal from an adverse judgment, whereas they certainly would want such an appeal to go forward. The Guaranty funds bootstrap inadequacy of representation as emerging from that potential scenario. If such a scenario were to develop, however, the Guaranty Funds could seek to

intervene, under Rule 24(a) (2), at that stage. See Id., at 568; see also Dagget v. Comm. on Governmental Ethics and Election Practices, 172 F.3d 104, 112 (1st Cir. 1999); Americans United for Separation of Church and State v. City of Grand Rapids, 922 F.2d 303, 306 (6th Cir. 1990) Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); 7C Wright, Miller & Kane, Federal Practice and Procedure § 1909, at 345 & n.38 (1986). This opportunity renders the Guaranty Funds' potential future harm remediable.

I cannot find any past or foreseeable basis to deem the Commissioner's defense of the Massachusetts distribution scheme inadequate, vis-à-vis the Guaranty Funds' interests. Consequently, the motion for intervention as of right will be denied without prejudice to resubmittal in light of the appellate posture of these proceedings.

B. Permissive Intervention

Even where intervention as of right is not recognized, permissive intervention may be granted, at the discretion of the court, where (1) the application to intervene is timely; (2) the applicant's claim and the main action share a common question of law or fact; and (3) intervention would not result in undue delay or prejudice to the original parties. Fed. R. Civ. P. 24(b). Given the adequacy of the Commissioner's representation in this case, however, I am disinclined to permit the intervention. The fact that the Commissioner's potential refusal to appeal an adverse judgment does not, according to the caselaw, necessarily foreclose the Guaranty Funds ability to take on such appeal at that stage further convinces me that there is no need to permit intervention at the present time.

Thus, the motion for permissive intervention is DENIED.

V. CONCLUSION

For the reasons set forth more fully above, I DENY the Guaranty Funds' motion for intervention, and GRANT the Receiver's motion for summary judgment only as to Count II.[30] Accordingly, I direct that judgment be entered declaring that the Receiver may pay the claims of insurance guaranty funds on behalf of policyholders, in accordance with Mass. Gen. Laws ch. 175 § 180F, prior to non-policyholder claims of the United States.

s/Douglas P. Woodlock

DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

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[30] I find Garcia bars judgment for the Receiver on Count I, the filing deadline issue, and I find Count III moot. Count III of the Complaint sought relief under § 706(l) of the Administrative Procedures Act ("APA"), which requires a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(l). The Receiver claims that the Department of Justice "unreasonably delayed" acting on her request that the United States assent or conditionally waive its claims under 31 U.S.C. § 3713 to the proposed fifth "early access" distribution to the guaranty funds. The complaint sought a judgment ordering the United States to act on the Commissioner's request. The United States moved to dismiss Count III on the ground that its "decision not to consent to the conditional waiver is not reviewable" under the APA; the Receiver acknowledges that Count III of the complaint is moot in any event because the United States through this litigation has denied her request.

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 01-2553

LINDA RUTHARDT,
in her official capacity as COMMISSIONER OF INSURANCE
OF THE COMMONWEALTH OF MASSACHUSETTS
and PERMANENT RECEIVER OF
AMERICAN MUTUAL LIABILITY INSURANCE COMPANY and AMERICAN
MUTUAL INSURANCE COMPANY OF BOSTON,
Plaintiff,

v.

UNITED STATES OF AMERICA and JOHN ASHCROFT,
in his official capacity as
ATTORNEY GENERAL OF THE UNITED STATES,
Defendants, Appellees.

ALABAMA INSURANCE GUARANTY ASSOCIATION, ET AL.,
Movants, Appellants.

No. 01-2587
No. 01-2668

LINDA RUTHARDT,
in her official capacity as COMMISSIONER OF INSURANCE
OF THE COMMONWEALTH OF MASSACHUSETTS
and PERMANENT RECEIVER OF
AMERICAN MUTUAL LIABILITY INSURANCE COMPANY and AMERICAN
MUTUAL INSURANCE COMPANY OF BOSTON,
Plaintiff, Appellant/Cross-Appellee,

v.

UNITED STATES OF AMERICA and JOHN ASHCROFT,
in his official capacity as
ATTORNEY GENERAL OF THE UNITED STATES,
Defendants, Appellees/Cross-Appellants.

ALABAMA INSURANCE GUARANTY ASSOCIATION, ET AL.,
Movants.

Before
Boudin, Chief Judge,
Selya, Circuit Judge
and Greenberg,* Senior Circuit Judge
[and Juan R. Torruella, J.
Sandra L. Lynch, J.
Kermit V. Lipez, J.
Jeffery R. Howard, J.]

ORDER OF THE COURT
Entered: October 31, 2002

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

By the Court:
Richard Cushing Donovan, Clerk

[cc: all counsel of record]

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*Of the Third Circuit, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 01-2553

LINDA RUTHARDT,
in her official capacity as COMMISSIONER OF INSURANCE
OF THE COMMONWEALTH OF MASSACHUSETTS
and PERMANENT RECEIVER OF
AMERICAN MUTUAL LIABILITY INSURANCE COMPANY and AMERICAN
MUTUAL INSURANCE COMPANY OF BOSTON,
Plaintiff,

v.

UNITED STATES OF AMERICA and JOHN ASHCROFT,
in his official capacity as
ATTORNEY GENERAL OF THE UNITED STATES,
Defendants, Appellees.

ALABAMA INSURANCE GUARANTY ASSOCIATION, ET AL.,
Movants, Appellants.

No. 01-2587
No. 01-2668

LINDA RUTHARDT,
in her official capacity as COMMISSIONER OF INSURANCE
OF THE COMMONWEALTH OF MASSACHUSETTS
and PERMANENT RECEIVER OF
AMERICAN MUTUAL LIABILITY INSURANCE COMPANY and AMERICAN
MUTUAL INSURANCE COMPANY OF BOSTON,
Plaintiff, Appellant/Cross-Appellee,

v.

UNITED STATES OF AMERICA and JOHN ASHCROFT,
in his official capacity as
ATTORNEY GENERAL OF THE UNITED STATES,
Defendants, Appellees/Cross-Appellants.

ALABAMA INSURANCE GUARANTY ASSOCIATION, ET AL.,
Movants.

JUDGMENT

[Michael Boudin, C.J.
Bruce M. Selya, J.
Morton I. Greenberg, J.]

Entered: September 18, 2002

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The decision of the district court is affirmed. The alternative request of the guaranty funds to intervene in this case is granted as of September 18, 2002, the release date of the opinion of this court. Each side to bear its own costs in this court.

By the Court:

S/Richard Cushing Donovan
Richard Cushing Donovan, Clerk

[cc: Mr. Tanski, Ms. Kane, Mr. Barnico, Mr. Snider, and Mr. Glover]

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
Civil Action No. 00-12417-DPW
LINDA RUTHARDT, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF INSURANCE OF THE COMMONWEALTH OF MASSACHUSETTS and PERMANENT RECEIVER OF AMERICAN MUTUAL LIABILITY INSURANCE COMPANY and AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,
Plaintiff,
v.
UNITED STATES OF AMERICA, AND JOHN ASHCROFT IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES,
Defendants.

JUDGMENT

WOODLOCK, D.J.

In accordance with the Memorandum and Order issued September 27, 2001, Denying the Guaranty Funds' Motion for intervention, and Granting the Receivers Motion for Summary Judgment only as to Count II, and finding judgment for the Receiver on Count I is barred and Count III is moot, it is hereby ORDERED, ADJUDGED AND DECREED:

Judgment is entered declaring that the Receiver may pay the claims of insurance guaranty funds on behalf of policyholders, in accordance with Mass. Gen. Laws ch. 175 § 180F, prior to non-policyholder claims of the United States.

September 27, 2001

BY THE COURT,
s/Rebecca Greenberg
Deputy Clerk

APPENDIX F

Mass. Gen. Laws ch. 175, § 180C (2000)

If the commissioner deems that a domestic company which is the subject of a rehabilitation proceeding under section one hundred and eighty B, or which may properly be the subject of such a proceeding for any cause referred to in said section, hereinafter referred to as the company, is insolvent and that it should be liquidated, he shall make application to the court for a decree authorizing him to liquidate the company. The court, after notice to all known creditors and stockholders of the company and a full hearing, may order its liquidation and appoint the commissioner as permanent receiver thereof. The pertinent provisions of section six and of section one hundred and eighty B shall apply in case of any application under this section.

Upon the entry of a decree ordering liquidation of a company the receiver shall proceed forthwith to liquidate the business thereof. Subject to the approval of the court, he may sell or otherwise dispose of the real and personal property, or any part thereof, and sell or compromise all choses in action, of the company. He shall endeavor to obtain a proposal from a solvent company or companies to take over or assume the policies of the company in whole or in part, or to take over or assume, on modified terms, the liabilities of the company to its policyholders, and shall submit to the court such proposal as he deems best for the interest of the policyholders. He may, with the authority of the court, which it may give if in its opinion the best proposal in the interest of the policyholders has been obtained, execute such contracts and make such assignments and transfers as may be necessary to carry such proposal into effect.

Within one hundred and twenty days of a final determination of insolvency of a company by the supreme judicial court, the receiver shall make application to the supreme judicial court for approval of a proposal to disburse assets out of such company's marshalled assets from time to time as such assets become available, to the Massachusetts Insurers Insolvency Fund, the Massachusetts Life and Health Insurance Guaranty Association, and to any similar organization in another state, such fund, association or organization hereinafter collectively referred to as Funds. The supreme judicial court may approve or disapprove the proposal in whole or in part.

Such proposal shall at least include provision for:

(a) reserving amounts for the payment of the expenses of administration and claims falling within the priorities established in section one hundred and eighty F;

(b) disbursement of the assets marshalled to date and subsequent disbursements of assets as they become available;

(c) equitable allocation of disbursements to each of the Funds entitled thereto; and

(d) the securing by the receiver from each of the Funds entitled to disbursements an agreement to return to the receiver such assets previously disbursed as may be required to pay claims of secured creditors and claims falling within the priorities established in section one hundred and eighty F. No bond shall be required of any such Fund.

The receiver's proposal shall provide for disbursements to the Funds in amounts at least equal to the payments made or to be made thereby for which such Funds could assert claims against the receiver, and shall further provide that if the assets available for disbursement from time to time do not equal or exceed the amount of such payments made or to be

made by the Funds then disbursements shall be in the amount of available assets.

Notice of such application shall be given to the Funds in and to the commissioners of insurance of each of the states in which the insurer was doing business. Any such notice shall be deemed to have been given when deposited in the United States mails, first class postage prepaid, at least thirty days prior to submission of such application to the supreme judicial court. Action on the application may be taken by the supreme judicial court provided the above required notice has been given and the proposal complies with this section.

The rights and liabilities of the company and of its creditors, except those holding contingent claims, and of its policyholders, stockholders or members, and of all other persons interested in its assets, shall, unless otherwise ordered by the court, be fixed as of the date of the decree ordering liquidation. The rights of claimants holding contingent claims shall be determined as provided in sections one hundred and eighty G and one hundred and eighty H.[1]

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[1] The last paragraph, which concerns setoff between insurers, is omitted.

Other Statutes Providing For Appointment Of State Insurance Regulatory Official As Receiver Or Liquidator

Ala. Code §§ 27-32-2(d), 27-32-7 and 27-32-12 (Michie 1986)
Alaska Stat. § 21.78.100 (2002)
Ariz. Rev. Stat. Ann. § 20-624 (West 2002)
Ark. Code Ann. § 23-68-111 (Michie 2001)
Cal. Ins. Code § 1016 (Deering 1992)
Col. Rev. Stat. Ann. § 10-3-517 (West 1999)
Conn. Gen. Stat. Ann. § 38a-920 (West 2000)
Del. Code Ann. tit. 18, § 5911 (1999)
D.C. Code Ann. § 31-1316 (2002)
Fla. Stat. Ann. § 631.111 (West 1996)
Ga. Code Ann. § 33-37-17 (Michie 1996)
Haw. Rev. Stat. Ann. § 431:15-307 (1993)
Idaho Code § 41-3318 (Michie 1998)
215 Ill. Comp. Stat. Ann. 5/191 and 5/193 (West 2000)
Ind. Code Ann. § 27-9-3-7 (Michie 1999)
Iowa Code Ann. § 507C.18 (West 1998)
Kan. Stat. Ann. § 40-3622 (2001)
Ky. Rev. Stat. Ann. § 304.33-200 (Michie 2001)
La. Rev. Stat. Ann. § 22:735 (West 1995)
Me. Rev. Stat. Ann. tit. 24-A, § 4364 (West 2000)
Md. Code Ann., Ins. § 9-218 (1997)
Mich. Comp. Laws Ann. § 500.8118 (West 2002)
Minn. Stat. Ann. § 60B.21 (West 2003 Supp.)
Miss. Code Ann. § 83-24-35 (1999)
Mo. Ann. Stat. § 375.1176 (West 2002)
Mont. Code Ann. § 33-2-1342 (2001)
Neb. Rev. Stat. Ann. § 44-4818 (Michie 2000)
Nev. Rev. Stat. 696B.255 and 696B.290 (2001)
N.H. Rev. Stat. Ann. § 402-C:21 (1998)
N.J. Stat. Ann. § 17:30C-15 (West 1994)
N.M. Stat. Ann. § 59A-41-30 (Michie 2000)
N.Y. Ins. Law § 7409 (Consol. 2001)
N.C. Gen. Stat. § 58-30-105 (2002)

N.D. Cent. Code § 26.1-06.1-17 (2002)
Ohio Rev. Code Ann. § 3903.18 (West 1995)
Okla. Stat. Ann. tit. 36, § 1914 (West 2003 Supp.)
Or. Rev. Stat. § 734.160 (2001)
Pa. Cons. Stat. Ann. § 221.20 (West 1999)
R.I. Gen. Laws § 27-14.3-22 (1998)
S.C. Code Ann. § 38-27-370 (Law. Co-op. 2002)
S.D. Codified Laws § 58-29B-42 (Michie 2000)
Tenn. Code Ann. § 56-9-307 (2000)
Tex. Ins. Code Ann. § 21.28, Sec. 2 (Vernon 2003 Supp.)
Utah Code Ann. § 31A-27-310 (2001)
Vt. Stat. Ann. tit. 8, § 7057 (1993)
Va. Code Ann. § 38.2-1504 (Michie 2002)
Wash. Rev. Code Ann. §§ 48.31.111 and 48.31.121 (West 1999)
W. Va. Code Ann. § 33-10-11 (Michie 2002)
Wis. Stat. Ann. § 645.42 (West 1995)
Wyo. Stat. Ann. §§ 26-28-106 and 26-28-110 (2001)
22 V.I. Code Ann. §§ 1256 and 1262 (1993)
26 P.R. Laws Ann. § 4015 (1997)

Mass. Gen. Laws ch. 175, § 180F (2000)

Section 180F. In any liquidation proceeding begun in this commonwealth against an insurer domiciled in this commonwealth, and transacting business in any other reciprocal state, claimants residing in a reciprocal state may file and prove claims either with the ancillary receiver, if any, or with the domiciliary receiver; provided, that all such claims shall be filed on or before the last date fixed by the court for the filing of claims in the domiciliary proceeding.

In any such proceeding, contested claims belonging to claimants residing in such reciprocal state either (a) may be proved in this commonwealth under the law of this commonwealth, or (b), if ancillary proceedings have been commenced in such reciprocal state, may be proved in such ancillary proceedings.

In the event a claimant elects to prove his claim in ancillary proceedings, if notice of the claim and opportunity to appear and to be heard is afforded the domiciliary receiver of the commonwealth as provided in section one hundred and eighty I with respect to ancillary proceedings in the commonwealth, the final allowance of such claim by the courts of the ancillary state shall be accepted in the commonwealth as conclusive as to its amount and priority, if any, against special deposits or other security located within the ancillary state. In a delinquency proceeding against an insurer domiciled in the commonwealth, claims owing to residents of ancillary states shall be preferred claims if like claims are preferred under the laws of the commonwealth. All such claims, whether owing to residents or nonresidents, shall be given equal priority of payment from general assets regardless of where such assets are located.

In a delinquency proceeding against an insurer domiciled in a reciprocal state, claims owing to

residents of the commonwealth shall be preferred if like claims are preferred by the laws of the state.

The priority of distribution from the general assets of an insurer in a liquidation proceeding shall be in the order set forth below. Every claim in each priority class shall, subject to such limitations as may be prescribed by law and that do not directly conflict with the express provisions of this section, be paid in full or adequate funds shall be retained for such payment before the members of the next class receive any payment. Except as otherwise expressly provided in this section, no subclasses shall be established within any of the first six priority classes. The order of distribution of claims shall be:

(1) expenses of administration;

(2) claims of policyholders, beneficiaries and insureds arising from and within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company and claims presented by the Massachusetts Insurers Insolvency Fund, the Massachusetts Life and Health Insurance Guaranty Association or any similar organization in another state, but the workers' compensation claims afforded a preference in section 46A shall be treated as preferred only as respects all other claims in this clause;

(3) claims for return premiums under section 46;

(4) claims of the federal government other than those included in class 2 or 3;

(5) compensation of employees other than officers for services rendered within three months prior to the commencement of a proceeding under section 180C not to exceed $1,000 for each such employee;

(6) claims for taxes and debts due to any state or local government, which are secured by liens perfected prior to the commencement of delinquency proceedings; and

(7) all other claims.

During the pendency of delinquency proceedings in the commonwealth or any other state, no action or proceeding in the nature of an attachment, garnishment, or levy on execution shall be commenced or maintained in the courts of the commonwealth against the delinquent insurer or its assets. Any lien obtained by any such action or proceeding within four months prior to the commencement of any such delinquency proceeding or any time thereafter shall be void as against any rights arising in such delinquency proceeding.

Separate account agreements providing that the assets in separate accounts to which such agreements relate shall not be chargeable with liabilities arising out of any other business of the insurer shall, to the extent of the reserves and other contract liabilities with respect to such agreements, be satisfied out of the assets available in the related separate accounts, subject to the claims of creditors for services rendered or credit extended with respect to such separate accounts. Such claims shall be payable in accordance with their terms, and to the extent, if any, that the insurer's obligations under such separate account agreements are not fully discharged by the assets available in such separate accounts, such deficiency shall be treated as a claim against the general assets of the life insurance company with the same priority as claims of policyholders, beneficiaries and insureds pursuant to the priority class set forth in clause (2) of the fifth paragraph.

Other Statutes Providing For A Claim Filing Deadline In Insurer Liquidation Proceedings

Ala. Code § 27-32-31 (Michie 1986)
Alaska Stat. §§ 21.78.290 and 21.78.292 (2002)
Ariz. Rev. Stat. Ann. § 20-640 (West 2002)
Ark. Code Ann. § 23-68-129 (Michie 2001)
Cal. Ins. Code § 1021 (Deering 2003 Supp.)
Col. Rev. Stat. §§ 10-3-521 and 10-3-534 (West 1999)
Conn. Gen. Stat. Ann. §§ 38a-924 and 38a-937 (West 2000)
Del. Code Ann. title 18, § 5929 (1999)
D.C. Code Ann. §§ 31-1320 and 31-1333 (2002)
Fla. Stat. Ann. § 631.181 (West 2003 Supp.)
Ga. Code Ann. §§ 33-37-21 and 33-37-34 (Michie 96)
Haw. Rev. Stat. Ann. §§ 431:15-311 and 431:15-325 (1993)
Idaho Code §§ 41-3332 and 41-3335 (Michie 1998)
215 Ill. Comp. Stat. Ann. 5/208 (West 2000)
Ind. Code Ann. §§ 27-9-3-10 and 27-9-3-33 (Michie 1999)
Iowa Code Ann. §§ 507C. 22 and 507C. 35 (West 1998)
Kan. Stat. Ann. § 40-3636 (2001)
Ky. Rev. Stat. Ann. §§ 304.33-250 and 304.33-360 (Michie 2001)
La. Rev. Stat. Ann. § 22:748 (West 1995)
Me. Rev. Stat. Ann. tit. 24-A, § 4377 (West 2000)
Md. Code Ann., Ins. § 9-226 (1997)
Mich. Comp. Laws Ann. §§ 500.8122 and 500.8135 (West 2002)
Minn. Stat. Ann. § 60B.26 (West 2003 Supp.) and § 60B.37 (West 1996)
Miss. Code Ann. §§ 83-24-43 and 83-24-69 (1999)
Mo. Ann. Stat. § 375.1206 (West 2002)
Mont. Code Ann. §§ 33-2-1346 and 33-2-1364 (2001)
Neb. Rev. Stat. Ann. §§ 44-4822 and 44-4835 (Michie 2000)
Nev. Rev. Stat. 696B.460 (2001)

N.H. Rev. Stat. Ann. §§ 402-C:26 and 402-C:37 (1998)
N.J. Stat. Ann. § 17:30C-30 (West 1994)
N.M. Stat. Ann. § 59A-41-41 (Michie 2000)
N.Y. Ins. Law § 7432 (Consol. 2001)
N.C. Gen. Stat. §§ 58-30-125 and 58-30-185 (2002)
N.D. Cent. Code §§ 26.1-06.1-21 and 26.1-06.1-34 (2002)
Ohio Rev. Code Ann. §§ 3903.22 and 3903.35 (West 1995)
Okla. Stat. Ann. tit. 36, § 1930 (West 1999)
Or. Rev. Stat. § 734.390 (2001)
Pa. Cons. Stat. Ann. § 221.24 (West 1999)
R.I. Gen. Laws §§ 27-14.3-26 and 27-14.3-39 (1998)
S.C. Code Ann. §§ 38-27-410 and 38-27-540 (Law. Co-op. 2002)
S.D. Codified Laws §§ 58-29B-52 and 58-29B-103 (Michie 2000)
Tenn. Code Ann. §§ 56-9-311 and 56-9-323 (2000)
Tex. Ins. Code Ann. § 21.28, Sec. 3 (Vernon 2003 Supp.)
Utah Code Ann. § 31A-27-315 (2002 Supp.) and § 31A-27-328 (2001)
Vt. Stat. Ann. tit. 8, § 7061 (1993)
Va. Code Ann. § 38.2-1606(ii) (Michie 2002) (guaranty fund statute)
Wash. Rev. Code Ann. § 48.31.310 (West 1999)
W. Va. Code Ann. § 33-10-30 (Michie 2002)
Wis. Stat. Ann. § 645.47 (West 2002 Supp.) and § 645.61 (West 1995)
Wyo. Stat. Ann. § 26-28-128 (2001)
22 V.I. Code Ann. § 1280 (1993)
26 P.R. Laws Ann. §§ 4019 and 4032 (1997)

Other "Fabe-Cured" Priority Statutes

Ariz. Rev. Stat. Ann. § 20-629 (West 2002)
Ark. Code. Ann. § 23-68-126 (Michie 2001)
Cal. Ins. Code § 1033 (Deering 2003 Supp.)
Colo. Rev. Stat. Ann. § 10-3-541 (West 2002 Supp.)
Conn. Gen. Stat. Ann. § 38a-944 (West 2001)
Del. Code Ann. tit. 18 § 5918 (2002 Supp.)
Fla. Stat. Ann. § 631.271 (West 1996)
Ga. Code Ann. § 33-37-41 (Michie 2002 Supp.)
Haw. Rev. Stat. Ann. § 431:15-322 (2001 Supp.)
Idaho Code § 41-3342 (Michie 2002 Supp.)
215 Ill. Comp. Stat. Ann. 5/205 (West 2002 Supp.)
Ind. Code Ann. § 27-9-3-40 (Michie 1999)
Iowa Code Ann. § 507C.42 (West 1998)
Ky. Rev. Stat. Ann. § 304.33-430 (Michie 2002 Supp.)
La. Rev. Stat. Ann. § 22:746 (West 2002 Supp.)
Md. Code Ann., Ins. § 9-227 (2002 Supp.)
Mich. Comp. Laws Ann. § 500.8142 (West 2002)
Minn. Stat. Ann. § 60B.44 (West 2002 Supp.)
Miss. Code Ann. § 83-24-83 (2002 Supp.)
Mo. Ann. Stat. § 375.700 (West 2002)
Mont. Code Ann. § 33-2-1371 (2001)
Neb. Rev. Stat. Ann. § 44-4842 (Michie 2002 Supp.)
Nev. Rev. Stat. 696B.420 (2001)
N.H. Rev. Stat. Ann. § 402-C:44 (2002 Supp.)
N.Y. Ins. Law § 7434 (Consol. 2001)
N.C. Gen. Stat. § 58-30-220 (2002)
N.D. Cent. Code § 26.1-06.1-41 (2002)
Ohio Rev. Code Ann. § 3903.42 (West 2002 Supp.)
Okla. Stat. Ann. tit. 36, § 1927.1 (West 1999)
Or. Rev. Stat. § 734.360 (2001)
Pa. Cons. Stat. Ann. § 221.44 (West 1999)
S.C. Code Ann. § 38-27-610 (Law. Co-op. 2002)
Tenn. Code Ann. § 56-9-330 (2002 Supp.)
Tex. Ins. Code Ann. § 21.28, Sec. 8 (Vernon 2002)
Utah Code Ann. § 31A-27-335 (2001)
Vt. Stat. Ann. tit. 8, § 7081 (2002 Supp.)
Va. Code Ann. § 38.2-1509 (Michie 2002)

Wash. Rev. Code Ann. § 48.31.280 (West 2003 Supp.)
W. Va. Code Ann. § 33-10-19a (Michie 2002)
Wisc. Stat. Ann. § 645.68 (West 2002 Supp.)

Mass. Gen. Laws ch. 175D, § 1(2) (2000)

As used in this chapter the following words shall, unless the context clearly requires otherwise, have the following meanings:- . . .

(2) "Covered claim'", an unpaid claim, including one for unearned premiums, which arises out of and is within the coverage of an insurance policy to which this chapter applies issued by an insurer, if such insurer becomes an insolvent insurer and (a) the claimant or insured is a resident of the commonwealth; or (b) the property from which the claim arises is permanently located in the commonwealth.

"Covered claim" shall not include any amount due any reinsurer, insurer, insurance pool, or underwriting association; provided, that a claim for any such amount, asserted against a person insured under a policy issued by an insurer which has become an insolvent insurer, which, if it were not a claim by or for the benefit of a reinsurer, insurer, insurance pool or underwriting association, would be a "covered claim" may be filed directly with the receiver of the insolvent insurer, but in no event may any such claim be asserted against the insured of such insolvent insurer.

Mass. Gen. Laws ch. 175D, § 5(1) (2000)

The [Massachusetts Insurers Insolvency] Fund shall:

(a) be obligated to the extent of the covered claims against the insolvent insurer existing prior to the declaration of insolvency and arising within sixty days after the declaration of insolvency, or before the

policy expiration date if less than sixty days after the declaration, or before the insured replaces the policy or requests cancellation, if he does so within sixty days of the declaration, but such obligation shall include only that amount of each covered claim which, unless it is a claim for compensation or other benefits which arises out of and is within the coverage of a workers' compensation policy, is less than three hundred thousand dollars;

(b) be deemed the insurer to the extent of its obligation on the covered claims and shall have all rights, duties and obligations of the insolvent insurer to such extent;

(c) assess insurers the amounts necessary to pay the obligations of the Fund and the expenses of handling covered claims subsequent to an insolvency and to pay the cost of examinations under paragraph (1) of section eight and other permissible expenses incurred under this chapter. The assessments of each insurer shall be in the proportion that the net direct written premiums of the insurer for the calendar year preceding the assessment bears to the net direct written premiums of all insurers for the calendar year preceding the assessment. Each insurer shall be notified of the assessment not later than thirty days before it is due. No insurer may be assessed in any year an amount greater than two per cent of that insurer's net direct written premiums for the calendar year preceding the assessment. If the maximum assessment, together with the other assets of the Fund, does not provide in any one year an amount sufficient to make all necessary payments, the funds available may be prorated and the unpaid portion shall be paid as soon thereafter as funds become available. The Fund shall pay claims in any order which it may deem reasonable, including the payment of claims as such are received from the claimants or in groups or categories of claims. The Fund may exempt or defer, in whole or in part, the assessment of any

insurer, if the assessment would cause the insurer's financial statement to reflect amounts of capital or surplus less than the minimum amounts required for a certificate of authority by any jurisdiction in which the insurer is authorized to transact insurance, provided, however, that during the period of deferment, no dividends shall be paid to shareholders or policyholders. Deferred assessments shall be paid when such payment will not reduce capital or surplus below required minimums. Such payments shall be refunded to those companies receiving larger assessments by virtue of such deferment, or at the election of any such company, credited against future assessments. Each insurer serving as a servicing facility may set off against any assessment authorized payments made on covered claims and expenses incurred in the payment of such claims by such insurer;

(d) investigate claims brought against the Fund and adjust, compromise, settle and pay covered claims to the extent of the Fund's obligation and shall deny all other claims; . . . [1]

Mass. Gen. Laws ch. 175D, § 8 (2000)

(1) Any person recovering under this chapter shall be deemed to have assigned his rights under the policy to the Fund to the extent of his recovery from the Fund, but shall retain the right to recover from the receiver or liquidator of the insolvent insurer any amount of his claim under the coverage of the policy not paid by the Fund. Every person with a right to recover under this chapter shall cooperate with the Fund in the handling of the claim to the same extent as such person would have been required to cooperate with the insolvent insurer. The Fund shall have no

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[1] Subsections (e)-(g) omitted.

cause of action against the insured of the insolvent insurer for any sums it has paid out.

(2) The receiver, liquidator or statutory successor of an insolvent insurer shall be bound by settlements of claims by the Fund and shall grant, against the assets of the insolvent insurer, priority equal to that which the claimant would have been entitled in the absence of this chapter.

(3) The Fund shall periodically file with the receiver or liquidator of the insolvent insurer statements of the covered claims paid by the Fund and estimates of anticipated claims on the Fund which shall preserve the rights of the Fund against the assets of the insolvent insurer.

Mass. Gen. Laws ch. 175D, § 13 (2000)

The rates and premiums charged for insurance policies to which this chapter applies shall include amounts sufficient to recoup over a reasonable length of time a sum equal to the amounts paid to the Fund by the insurer less any amounts returned to the insurer by the Fund.

APPENDIX G

[Rackemann, Sawyer & Brewster Letterhead]

September 16, 1998

Ms. Sandra P. Spooner
Deputy Director – Commercial Litigation Branch
Civil Division
United States Department of Justice
Post Office Box 875
Ben Franklin Station
Washington, D.C. 20044

Re: American Mutual Receiverships

Dear Ms. Spooner:

Enclosed are a number of materials which I have either prepared or collected since our meeting on August 5th:

1. Draft Non-Waiver Agreement: In order to provide greater definition to the concept which I presented when we met, we have prepared the enclosed Non-Waiver Agreement between the United States and the Permanent Receiver.

The critical elements of this agreement are that both parties would preserve all their rights, except that they agree that any issues between them be the last issues to be resolved in the proceeding, that the Permanent Receiver segregate $5,000,000 for the payment of any United States claims and that the United States limits its claims to that segregated sum. I simply selected the $5,000,000 number as a reasonable significant multiple of the known potential

Federal claims discussed below. We are of course prepared to discuss all these issues with you.

2. Potential Federal Claims: As described further in this letter and its enclosures, we have sought, since the August meeting, to carefully review the available records to identify possible Federal claims. I enclose copies of the claims filed with the Permanent Receiver which we feel might constitute "Federal claims", Exhibit 1. We have identified possible Federal claims against the American Mutual Liability Insurance Company ("AMLICO") estate totaling $636,800 and American Mutual Insurance Company of Boston ("AMI") estate of $5,740.

We are aware of no AMLICO or AMI obligations to the Internal Revenue Service or Pension Benefit Guaranty Corporation ("PBGC"). AMLICO presently has $441 million of tax loss carry-forwards and AMI has $85.9 million. The American Mutual Retirement Plan--1985 was terminated effective March 31, 1998 and a group annuity should be purchased shortly to fund its remaining obligations to participants. The PBGC review period has expired. This was a standard (non-distress) termination.

3. Accident and Health Writings: During our meeting, you asked that I provide you with information concerning AMLICO's and AMI's accident and health ("A&H") business for 1985-1988. (As of January 1, 1988, American Policyholders' Insurance Company, a solvent wholly-owned subsidiary insurer of AMLICO, reinsured 100% of AMLICO's and AMI's voluntary business, except for their Massachusetts auto coverage, with a cut-through provision.)

Enclosed are Exhibit(s) of Premiums and Losses for 1985-1987, by line of business, for both AMLICO and AMI, Exhibit 2. I also asked that a listing be

prepared of all A&H policyholders for that same period, by particular policy type. Enclosed are computer reports (with a key for policy symbols) listing each AMLICO or AMI A&H policy for that time period, Exhibit 3. A review of the reports demonstrates that neither AMLICO nor AMI issued group major medical coverage. AMLICO did issue group disability income policies and AMI issued individual A&H policies. Although the total A&H premium figures on the Exhibits and the computer reports do not match (the computer reports indicate $436,000 more premium than the Exhibits), I feel very comfortable in confirming that neither AMLICO or AMI wrote any group major medical insurance during this period. (Due to the short-tail nature of such A&H claims, any coverage written prior to this reporting period is probably irrelevant.)

4. Medicare Offset Claims: Forty-five requests for reimbursement have been submitted to the Permanent Receiver for Medicare reimbursement respecting AMLICO employees covered under the self-insured American Mutual Comprehensive Major Medical Plan. Enclosed is photocopy of one such request (which is representative) and the type of response used to acknowledge each such claim, Exhibit 4. The total amount of such reimbursement requests is $69,865.

5. EPA Environmental Claim: The enclosed claim (See Exhibit 1) was filed by the EPA respecting AMLICO-insured Stanadyne, Inc. (now Moen, Inc.) concerning the Wayne Waste Oil Superfund Site, Columbia City, Indiana.

We have recently researched this claim and can report the following. The claim appears to have been filed at the suggestion of the Indiana Insurance Guaranty Association ("IIGA"), as a precondition to its considering coverage for Stanadyne. Ultimately, IIGA,

as well as the Connecticut, Delaware and Ohio guaranty associations, denied coverage. Fortunately, the final result was that the site was cleaned-up, EPA was reimbursed to its satisfaction and Stanadyne-Moen was a party to a December, 1997 consent decree which released it from further liability for this site. Enclosed is a copy of that consent decree and the related stipulation, Exhibit 5.

It is quite likely that EPA is involved with other sites in which AMLICO insureds are potentially responsible parties (AMI did not write commercial liability insurance). We plan to query each of the guaranty funds on this issue, as part of our effort to determine potential claims against AMLICO's reinsurers, and I expect that we will gain better information over the next twenty-four months. At this point, however, the Permanent Receiver has received only one EPA claim and that claim would appear to present no liability.

I hope that this letter and the enclosed materials will help in your evaluation of the proposed Non-Waiver Agreement. We will be meeting with the American Mutual Guaranty Association Advisory Committee during the last week of September to obtain their input on the proposed Liquidation Plan. I hope that we will be able to receive your initial reactions by early October. Please give me a call should you have any questions concerning our proposal or the enclosed materials.

Very truly yours,
s/J. David Leslie
J. David Leslie

Enclosures
cc: Daniel R. Judson
Thomas A. Barnico
Ronald S. Duby
Eric A. Smith

DRAFT OF 9/16/98

NON-WAIVER AGREEMENT

This NON-WAIVER AGREEMENT is entered into this __ day of September, 1998 by and between Linda L. Ruthardt, Massachusetts Commissioner of Insurance, in her capacity as Permanent Receiver (the "Receiver") of the American Mutual Liability Insurance Company and the American Mutual Insurance Company of Boston (collectively, "American Mutual"), and the United States of America ("United States").

WHEREAS, American Mutual has been the subject of a liquidation proceeding, pursuant to Mass. G.L. c. 175, § 180C, before a single justice of the Massachusetts Supreme Judicial Court (the "Court") since March 9, 1989; and,

WHEREAS, the United States may be a creditor of the American Mutual estates; and,

WHEREAS, the Receiver proposes to shortly file a Plan of Liquidation for American Mutual with the Court, which Plan will, among other things, specify the priorities for the payment of creditors and the process for the determination of claims; and,

WHEREAS, the Receiver and the United States have engaged in good faith discussions in an effort to resolve their differing views on proper priorities and claim determination procedures for American Mutual, but have not been able to resolve those issues between them at this time; and,

WHEREAS, the Receiver and the United States have concluded that it would be most efficient to await a determination of all other claims against the American Mutual estates before seeking to resolve

their outstanding disagreements either by agreement or litigation.

NOW, THEREFORE, IT IS HEREBY AGREED AS FOLLOWS:

1. The Receiver will submit a Plan of Liquidation which provides for the resolution of claims of the United States as the final substantive matter of the liquidation proceedings.

2. The Plan of Liquidation submitted by the Receiver will provide that $5,000,000 be segregated and held by the Receiver for the payment of claims, if any, of the United States until further order of the Court entered on not less than 30 days notice to the United States.

3. The United States agrees to limit its claims against American Mutual to a total of $5,000,000 in the aggregate for any and all claims.

4. Except as expressly set forth in this Non-Waiver Agreement, the Receiver and the United States reserve and do not waive any and all rights each may have against the other.

5. When substantially all claims against American Mutual except those of the United States have been determined, the Receiver will so notify the United States and the Receiver and the United States will proceed to consult for the purpose of seeking to resolve their differences.

6. Upon execution of this Non-Waiver Agreement, the Receiver will promptly submit it to the Court for approval. Subject to the Court's approval of the Non-Waiver Agreement in the form submitted, the

United States will not oppose entry of an order approving the Plan of Liquidation.

7. Should the Court not approve this Non-Waiver Agreement, then this Agreement will be void and of no effect.

LINDA L. RUTHARDT,
MASSACHUSETTS
COMMISSIONER OF INSURANCE,
IN HER CAPACITY AS
PERMANENT RECEIVER OF THE
AMERICAN MUTUAL LIABILITY
INSURANCE COMPANY AND THE
AMERICAN MUTUAL INSURANCE
COMPANY OF BOSTON

_____
Linda L. Ruthardt, as Receiver

FOR THE UNITED STATES OF
AMERICA

_____
Title:
Address:

nonwav9.16

APPENDIX H

[Rackemann, Sawyer & Brewster Letterhead]

May 14, 1999

Ms. Sandra Spooner
Deputy Director – Commercial Litigation Branch
Civil Division
United States Department of Justice
P.O. Box 875, Ben Franklin Station
Washington, D.C. 20044-0875

Re: American Mutual Receiverships

Dear Ms. Spooner:

Enclosed is a copy of the Permanent Receiver's Motion for Approval to Disburse Assets Pursuant to the Early Access Distribution Plan, Affidavit of Linda L. Ruthardt in support thereof, and proposed form of order approving such distribution, all of which were filed on May 12, 1999 with the Supreme Judicial Court for Suffolk County ("the Court"). This proposed distribution would be the fifth made under the Early Access Distribution Plan approved by the Court in June, 1993. Also enclosed are copies of your letters of March 13, 1995, April 8, 1996, April 1, 1997 and August 5, 1998 which confirmed that the United States did not object to the four prior distributions.

Could you please confirm that the United States does not object to the proposed fith distribution to eligible guaranty funds in the amount of $10,125,000, subject to the terms of the Early Access Plan previously approved by the Court. Please feel

free to contact me if you should have any questions about these materials.

Sincerely,

s/J. David Leslie
J. David Leslie

Enclosures

cc: Thomas Barnico
Daniel Judson
Ronald Duby

Supreme Court, U.S.
FILED
FEB 28 2003
OFFICE OF THE CLERK

Nos. 02-1124, 02-1135

IN THE

Supreme Court of the United States

JULIANNE M. BOWLER, in her official capacity as the Commissioner of Insurance of the Commonwealth of Massachusetts and Permanent Receiver of American Mutual Liability Insurance Company and American Mutual Insurance Company of Boston,

-and-

ALABAMA INSURANCE GUARANTY ASSOCIATION, *et al.*,

Petitioners,

v.

UNITED STATES; JOHN ASHCROFT, in his official capacity as Attorney General of the United States,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR NATIONAL CONFERENCE OF INSURANCE GUARANTY FUNDS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

EDWARD WALLIS
Assistant General Counsel of the NCIGF

ROWE W. SNIDER
Counsel of Record
RONALD M. LEPINSKAS
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Attorneys for Amicus Curiae
115 South LaSalle Street
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QUESTION PRESENTED

In the present case, the court of appeals concluded that "[a]n early bar date for United States claims has only a limited effect on policyholders" in insurance insolvencies. This conclusion is contrary to the record in this estate and in estates nation-wide, and led the circuit court to incorrectly apply *United States Dept. of the Treasury v. Fabe*, 508 U.S. 491 (1993). The bar date plays a vital role in allowing timely payments to policyholders, and squarely implicates the "business of insurance" under the McCarran-Ferguson Act. If the federal government may ignore the bar date, the federal government could continue to indefinitely hold hostage payments to policyholders.

This case presents the following question: Does a bar date in a state's statutory scheme regulating the liquidation of insurance companies apply to claims of the United States because it "regulates the business of insurance" under the McCarran-Ferguson Act?

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INTEREST OF *AMICUS CURIAE*

Amicus National Conference of Insurance Guaranty Funds ("NCIGF") is a national association of member property and casualty insurance guaranty funds of the 50 states, the District of Columbia and Puerto Rico. *Amicus* presents this Memorandum to the Court because it is uniquely positioned to offer a national perspective demonstrating how claims-filing deadlines ("bar dates") in property and casualty insurance insolvencies directly "further the goal of protecting policyholders" under the Supreme Court's decision in *United States Dept. of the Treasury v. Fabe*, 508 U.S. 491 (1993) ("*Fabe*"). Bar dates are a practical necessity for the payment of policyholders.

This case is of substantial significance to the NCIGF and its members due to the financial ramifications and administrative uncertainty that will result in insurance insolvencies if the Court concludes that the federal government is not bound by bar dates.[1]

STATEMENT OF THE CASE

This case arises from the liquidation of two insolvent insurance companies, American Mutual Liability Insurance Company and American Mutual Insurance Company of Boston (collectively "American Mutual"), and the application of two state statutory provisions to claims made by the United

---

1. *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation and submission of this brief. *Amicus* is filing this brief with the consent of all parties. Letters of consent have been filed with the Clerk of the Court.

States. In 1989, a Massachusetts state court appointed the state's Commissioner of Insurance as the Receiver of American Mutual. The state court also ordered all creditors of American Mutual to file claims with the Receiver by March 9, 1990.

The United States contended that, pursuant to the Federal Priority Act, 31 U.S.C. § 3713 (2000), it was entitled to priority distributions and immune from the one-year bar date. Under the Federal Priority Act, the Receiver is personally liable for the non-payment of valid claims by the United States. 31 U.S.C. § 3713(b) (2000). Because the assets of American Mutual are insufficient to satisfy all outstanding claims, the Act's potential personal liability is a live threat to the Receiver.

The Receiver then brought the underlying action. The district court held that the one-year bar date did not "regulate the business of insurance" and was thus preempted by the Federal Priority Act. *Ruthardt v. United States*, 164 F. Supp. 2d 232 (D. Mass. 2001). Though supportive of the Receiver's position on the merits, the district court explained that it was constrained by the decision in *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993). The circuit court affirmed this decision. *Ruthardt v. United States*, 303 F.3d 375 (1st Cir. 2002).

SUMMARY OF THE ARGUMENT

The circuit court concluded that:

> An early bar date for United States claims has only a limited effect on policyholders — who have priority anyway — and equally or primarily helps other general creditors.

Ruthardt, 303 F.3d at 385. This conclusion of a "limited effect on policyholders" is the crux of the circuit court's decision. The conclusion is contrary to the record in this estate and the reality of other estates nation-wide. In fact, as demonstrated below, the bar date plays an essential role in allowing timely payments to policyholders, a function that squarely implicates the McCarran-Ferguson Act.[2] *Fabe*, 508 U.S. at 506 (a "statute is enacted 'for the purpose of regulating the business of insurance' to the extent that it serves to ensure that, if possible, policyholders ultimately will receive payment on their claims") (citation omitted).

---

2. "Policyholders" refers to all denizens of the second priority of the liquidation claims priority statute (the "policyholder priority"), which includes all first- and third-party claimants and all guaranty fund claims. A first-party claimant is the holder of the insurance policy, a third-party claimant is not the holder, but has rights of recovery under the policy. For instance, with a car accident, the car owner has a first-party claim against his insurer, and a third-party involved in the accident may have rights of recovery against the car owner and thus under the car owner's policy. The guaranty funds, through their early payments to both first- and third-party claimants, are subrogated to their rights. "Policyholders" in this brief refers to all such persons having rights under the policies, unless otherwise stated.

If the bar date is not enforced against the federal government, the Receiver will not distribute funds to policyholders. The Receiver's declination is not petulance: the Receiver faces the prospect of personal liability under the Federal Priority Act. If the Receiver distributes the remaining funds to policyholders and thereafter the federal government — perhaps years from now — submits policyholder claims, the Receiver will have no means of payment, and thus will be exposed to personal liability to the federal government for such claims.

The result of the federal government's position is that the federal government may indefinitely hold hostage the Receiver's planned payments to policyholders. This result — which is the current status of this estate — cannot possibly be consistent with the McCarran-Ferguson Act.

REASONS FOR GRANTING THE PETITION

I. Without a Binding Bar Date, the Threat of Future Federal Policyholder Claims Creates Gridlock for Final Payment of All Policyholders.

The federal government has submitted only one policyholder claim to date in the American Mutual estate. It is thus tempting to infer that this case involves only late-filed, general creditor claims of the federal government. This inference, however, is not accurate. This dispute does not, as the federal government has asserted below, turn on a small amount of late-filed claims.

Instead, the dispute revolves around whether the federal government will submit additional *policyholder* claims at some point *in the future*. No one knows whether the federal

government will do so, but the risk that the federal government will do so is substantial enough that, coupled with the Receiver's potential for personal liability, the prospect of such claims has paralyzed the distribution process.

The Receiver has ample reason to worry that the federal government may someday file additional policyholder claims. Liability claims, even those incurred at the time of liquidation, may not be known and determined until years later, particularly where large commercial insurers are involved.[3] And sorting out, with finality, all the claims of the federal government potentially takes many years because, as its counsel put it in simple terms in the proceedings below, the government is huge. To be sure, the federal government's unwillingness, after fourteen years, to issue a final waiver of claims in this liquidation cements the Receiver's concern.

A. Because Distributions Are Pro Rata By Class, Delay in Identifying and Liquidating Federal Policyholder Claims Delays Final Payment of All Policyholder Claims.

Under the Massachusetts liquidation claims priority statute (as in every other state), distributions are made by priority. 1st Priority claims are paid in full first, then 2nd Priority claims are paid in full, and so on through the lower priorities. Lower priority claims receive nothing until higher priority claims are first paid in full. Claimants within a

3. By contrast, most general creditor claims are likely to be identified at or shortly after the liquidation commences. For example, supplier claims, which are a common type of general creditor claim, are typically either on the books of the insolvent insurer at the time of the liquidation or are billed shortly thereafter.

priority share ratably in a distribution. For example, a partial 2nd Priority distribution must be shared pro rata among 2nd Priority policyholder claimants.

In this estate — as is the case in almost all property and casualty insurer insolvencies — there are funds to pay in full the administrative expenses of the liquidation (1st Priority), but there are not enough funds to pay all policyholder claims (2nd Priority) in full, nor any funds to pay lower priority claims anything at all. *Thus, the only practical issues are how much money certain policyholder claimants (2nd Priority) will receive, and when they will receive it.*

The chart below illustrates the priorities and how they work here:

Liquidation Claims Priority	Will Be Paid?	Relevance to This Dispute
1st Administrative Expenses	Yes, in full	None
2nd Policyholder Claims (Including Future Federal Policyholder Claims)	Yes, partially	Under *Ruthardt*, they will not be paid until all future federal policyholder claims are resolved or waived.
3rd Unearned Premium Claims	No	None (1) There are insufficient funds to reach these priorities; and (2) Even if funds might be available, under *Ruthardt*, no payment could occur until higher priorities are satisfied in full, which could not happen without definitively knowing the extent of future federal policyholder claims.
4th General Creditor Federal Claims	No	
5th Wage Claims	No	
6th State and Local Tax Claims	No	
7th General Creditor Claims	No	

If the Receiver does not know the extent of the federal government's policyholder claims, then she cannot determine how much to distribute to *any* policyholders. With no bar to the federal government filing policyholder claims in the future, the Receiver cannot determine how much to ratably distribute within the policyholder class.

To distribute funds to policyholders, the Receiver must first calculate:

$$\frac{\text{\$ Available to Distribute}}{\text{Total \$ Amount of Policyholder Claims}} = \text{Payment \%}$$

And then for each policyholder claimant:

$$\text{Payment \%} \times \text{Individual Policyholder Claim} = \text{Policyholder Payment}$$

If the federal government cannot, or will not, identify the extent of its policyholder claims, then the Receiver cannot know the denominator ("Total $ Amount of Policyholder Claims"), and thus without this figure cannot calculate the proper payment percentage for any policyholder. This uncertainty results in paralysis.

No policyholder distribution will occur unless:

- The Receiver wants to gamble on there being no future federal policyholder claims; or
- The federal government waives its future policyholder claims.

The Receiver cannot be faulted for not gambling. Nor has the federal government waived future policyholder claims, even though this liquidation began fourteen years ago, and the policies on which its claims would be based are at least that old.

The district court aptly observed that actual "late-filed federal *policyholder* claims may substantively, and rather directly, interfere with the timely and orderly distribution of funds to general creditors." *Ruthardt v. United States*, 164 F. Supp. 2d at 244. Unfortunately, the district court did not discuss the devastating effect of the mere threat of late-filed federal policyholder claims on the "timely and orderly distribution of funds" to other policyholders — the only class of claimants with any chance of recovery.

Because the bar date is "reasonably necessary to further the goal of protecting policyholders," and "serves to ensure that . . . policyholders ultimately will receive payment on their claims," *Amicus* NCIGF respectfully requests that the Court find that the bar date falls within the scope of the McCarran-Ferguson Act. *Fabe*, 508 U.S. at 506, 509.

B. Bar Dates Are a Ubiquitous Necessity That Deserve the Same McCarran-Ferguson Protection as Administrative Costs.

Bar dates are as necessary to an orderly liquidation as the preferential payment of administrative costs. In *Fabe*, the Court found that, "[w]ithout payment of administrative costs, liquidation could not even commence," and thus ruled that administrative costs are "reasonably necessary to further the goal of protecting policyholders." Similar recognition of necessity is due bar dates for the reasons above. Without a

bar date, the most important aspect of the insurance liquidation process — the distribution of assets to policyholders — cannot occur.

There is no question that liquidators and guaranty funds throughout the fifty states see bar dates as a practical necessity. *See, e.g., Mercado Boneta v. Adminstracion Del Fondo de Compensacion al Paciente*, 125 F.3d 9, 18 (1st Cir. 1997) ("Absent a claims bar date, neither the affairs of PCFA nor the interest of pending claims could be finalized."). They are not merely "convenient." Bar dates do not exist simply to make the liquidator's job easier, but instead exist to make the liquidator's job possible, and thus to protect the interests of policyholders.

As such, the importance of bar dates to an orderly liquidation easily satisfies the requirements articulated in *Fabe* and its progeny. *See, e.g., Stephens v. American International Insurance Co.*, 66 F.3d 41, 45 (2nd Cir. 1995) (a state liquidation anti-arbitration law "has the end, intention, or aim of adjusting, managing or controlling the business of insurance, in that it *regulates the winding up of an insolvent insurance company*") (internal quotations omitted) (emphasis added); *Boozell v. United States*, 979 F. Supp. 670, 675 n.3 (N.D. Ill. 1997) (applying the "'end, intention, or aim of adjusting, managing, or controlling the business of insurance'" standard set forth in *Fabe* to find that the McCarran-Ferguson Act applies to the bar date).

To the best of *Amicus* NCIGF's knowledge, there has *never* been a property and casualty insurance liquidation without a claims bar date. The bar date may result in a complete cut-off of claims, or, alternatively, it may result in the subordination of late claims. *See, e.g., Clark v. Blue Cross*

Blue Shield of West Virginia, 510 S.E.2d 764, 780 (W. Va. 1998). Regardless of the individual circumstances, a bar date is always established in a property and casualty insurance insolvency proceeding. The bar date is indispensable to the administration of the estate.

The crucial role of bar dates in the administration of bankruptcy cases is also undeniable. *See, e.g., In re Drexel Burnham Lambert Group, Inc.*, 148 B.R. 1002, 1009 (S.D.N.Y. 1993) ("[Ignoring the bar date] would require recomputation . . . of everything which had occurred in reliance on the claims timely filed . . . , the promulgation of the Plan of Reorganization ... and the distributions of assets already made. . . ."); *In re Stern*, 70 B.R. 472, 475 n.4 (Bankr. E.D. Pa. 1987) (ignoring the bar date "would destroy the objective of finality which Congress obviously intended to promote"); *In re Milan Steel Fabricators, Inc.*, 113 B.R. 364, 367 (Bankr. N.D. Ohio 1990) ("The requirement that creditors file proofs of claim within a limited time . . . is necessary if cases are to be administered effectively.").

In the liquidation of insurance companies, bar dates are no less crucial, particularly where, as here, *future* federal policyholder claims are the threat.

*****

The circuit court concluded that the Federal Priority Act — enacted in 1789 by the very first Congress — ill fits the circumstances of the twenty-first century. 303 F.3d at 385 ("In a complicated liquidation, understandably the Commissioner . . . does not know exactly what claims the United States has so far failed to discover and assert. Some uniform limit is plainly needed."). *Amicus* NCIGF submits

that the trouble is far greater than perceived by the circuit court. Unless the Court recognizes that bar dates protect policyholders under the McCarran-Ferguson Act, the final payment of policyholders in insurance insolvencies nationwide will continue to be threatened by possible future federal policyholder claims. Because the federal government has still not waived such claims fourteen years after the American Mutual receivership began, now is the time to recognize the overwhelming, practical importance of bar dates for policyholders under *Fabe* and to hold the federal government subject to the bar date.

CONCLUSION

For the reasons stated above, *amicus* NCIGF respectfully urges the Court to grant the Petition.

Respectfully submitted,

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In The
Supreme Court of the United States

JULIANNE M. BOWLER, in her official capacity as COMMISSIONER OF INSURANCE OF THE COMMONWEALTH OF MASSACHUSETTS and PERMANENT RECEIVER OF AMERICAN MUTUAL LIABILITY INSURANCE COMPANY and AMERICAN MUTUAL INSURANCE COMPANY,

Petitioner,

v.

UNITED STATES and JOHN ASHCROFT, in his official capacity as ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE

The amicus curiae, the National Association of Insurance Commissioners ("NAIC"),[1] is a non-profit corporation whose membership consists of the chief insurance regulatory officials of each state, the four territories, and the District of Columbia. Created in 1871, it is the nation's oldest association of state government officials.

Only a member may cause the NAIC's filing an amicus curiae brief and such requires approval of the Executive Committee of the NAIC, which is made up of at least 15 of the NAIC's 50-plus members. *See* Bylaws of the National Association of Insurance Commissioners (1999) *at* http://www.naic.org/1consumerprotection/htm_files/NAIC_certificate_bylaws.htm (last visited Feb. 24, 2003). The mission of the NAIC as set out in its Certificate of Incorporation is

> [t]o assist state insurance regulators, individually and collectively, in serving the public interest and achieving the following fundamental insurance regulatory goals: (a) protect the public interest, promote competitive markets and facilitate the fair and equitable treatment of insurance consumers; (b) promote, in the public interest, the reliability, solvency, and financial solidity of insurance institutions; and (c) support and improve state regulation of insurance.

Id..

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[1] Pursuant to Supreme Court Rule 37.3, letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, this brief was authored in whole by undersigned counsel for the NAIC. No person, other than the amicus curiae made a monetary contribution to the preparation or submission of the brief.

The members promote the reliability of claim payments in their two different capacities as (a) the chief insurance regulators in each state and (b) as the officer of each state charged with handling insurer receiverships for that state.[2] Furthermore, relating to the central issue in this case, these members – or more properly their states – may be exposed to liability should they be deemed to be violating the Federal Priority Act, 31 U.S.C. § 3713(b) (2000).

"A system of effective solvency regulation provides crucial safeguards for America's insurance consumers [by requiring] that regulators have adequate statutory and administrative authority to regulate an insurer's corporate and financial affairs." NAIC Financial Regulation Standards and Accreditation Program (2000), at http://www.naic.org/regulator/docs/frsa12-02.doc (last visited Feb. 24, 2003).

For a state to be accredited by the NAIC its "[s]tate law should set forth a receivership scheme for the administration, by the insurance commissioner, of insurance companies found to be insolvent as set forth in the NAIC's Insurers Rehabilitation and Liquidation Model Act." *Id.*

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[2] *See Relfe v. Rundle*, 103 U.S. 222 (1881) (insurance receiver is officer of the state representing it while performing its public duties in winding up affairs of one of its insolvent insurers, with authority, not from the decree of the court, but from the statute); *Clark v. Willard*, 292 U.S. 112 (1934) (official liquidator is the successor to the corporation, not a mere receiver, and based on succession established for the corporation by the law of its creation). *See also* 1 Couch on Insurance, § 5:37 (3d ed. 1995); and Br. for Pet'r at 9 and Br. for Pet'r App. at 55a. States take over insolvent insurers in the same manner as the United States takes over failed banks. *See* Br. for Pet'r at 20.

To provide a comprehensive regulatory framework for insurer receiverships, the NAIC has promulgated several versions of the Insurers Rehabilitation and Liquidation Model Act (Model Act) over many years. *See* 3 NAIC Model Laws, Regulations and Guidelines (Model Laws) 555-1 to 555-62 (2003). Every state has, at some point, adopted the Model Act in effect at that time. *See* 3 Model Laws 555-63 to 555-67. The priority and claims bar date provisions in the Model Act are the provisions, as adopted in Massachusetts, which are at issue in this matter.[3]

This case is the latest in a series of cases in which the United States has asserted either or both (a) that federal claims should be paid before the claims of guaranty funds (prior to *United States Dept. of Treasury v. Fabe*, 508 U.S. 491 (1993), the United States asserted this position regarding all non-federal claims including administrative and insurance policy related claims), and (b) that federal claims are not subject to claim bar dates established by a state's statutory receiver and court in accordance with state statutes governing insurer receiverships. The NAIC

[3] In addition to the Model Act, the NAIC also played a role in the adoption of the other statute at issue in this matter, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 et seq. (West 1997). The passage of the McCarran-Ferguson Act was preceded by the introduction in the Senate Committee of a report and a bill submitted by the [NAIC] on November 16, 1944. 90 Cong. Rec. A4403-4408 (1944). The views of the NAIC are particularly significant, because the Act ultimately passed was based in large part on the NAIC bill. 91 Cong.Rec. 483 (1945) (remarks of Sen. O'Mahoney). *See Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 221 (1979). *See also* 1 Proc. of the Nat'l Ass'n of Ins. Comm'rs 23-58 (1945).

has filed amicus briefs in most of these cases that have reached the appellate courts.

SUMMARY OF ARGUMENT

This Court should grant the petitions[4] for certiorari and consider the claims bar date issue because (a) it is an issue of national importance impacting all states; (b) the reasons set out by both of the petitioners[5] as to (1) there being an important question of federal law that should be settled by this Court; (2) the conflicts and inconsistencies with the decisions of other state and federal courts; and (3) the misapplication of the standards and principles set out in *Fabe*; and (c) this Court set out standards and principles in *Fabe* that, due to conflicting interpretations of *Fabe* in state and federal courts, now require clarification.

[4] The Alabama Insurance Guaranty Association, et al., ("Petitioning State Guaranty Associations" or "Petitioning SGAs") also have submitted a Petition for Writ of Certiorari in this matter. (02-1135) The NAIC also supports the granting of the Petition of the Petitioning SGAs for the same reasons as are stated here.

[5] Pursuant to Supreme Court Rule 37.1, the NAIC will only supplement with relevant material not already brought to the Court's attention.

ARGUMENT

I. THE CLAIMS BAR DATE ISSUE IS ONE OF NATIONAL IMPORTANCE IMPACTING ALL STATES

The decision of the United States Court of Appeals for the First Circuit, *Ruthhardt v. United States*, 303 F.3d 375 (1st Cir. 2002), that the claim bar dates for insurer insolvencies do not apply to the United States will impact the states in several ways. These impacts are described below ranging from the more apparent and immediate impact on claimants in the states to the impact on the states' revenues through premium tax offset provisions. Another impact covered concerns the less apparent effect the decision by the Court of Appeals has – in combination with the absolute priority rule – to give the United States an incentive to delay releases to an insurer receivership until the estate accrues to the point that distributions can be made to the lower priority classes in which the United States is likely to have general claims. In other words, the holding by the Court of Appeals regarding claims bar dates provides an opportunity for the United States to circumvent the priority of distribution. Last, the prospect of increases in federal claims is covered.

A. The States And Their Insurance Claimants Are Impacted

The Court of Appeals conclusion regarding claim bar dates means that a federal claim can be filed at any time for any amount on any basis. Because this position is likely to be advanced by the United States in any state, an enormous risk would be assumed by any states as

receivers in making any distributions other than to the United States.

The NAIC's member states have been informed of this risk and many have indicated that they will delay paying distributions to any claimants in their insurer receiverships. Doing so is the only way for these states to ensure enough funds to pay a federal claim that may be made at *any* time. The result of this is nationally important because almost every state in the country may have to withhold payments to policyholders and other claimants until this matter is settled. A nationwide moratorium on claim payments is contrary to both the very concept of insurance and one of the primary purposes of insurance regulation. *Fabe* recognized this principle, noting that "[t]he primary purpose of a statute that distributes the insolvent insurer's assets to policyholders in preference to other creditors is identical to the primary purpose of the insurance company itself: the payment of claims made against policies." 508 U.S. at 505-06.

The holding in *Fabe* that a state may give a higher priority to policy-related claims (commonly referred to as "policyholder claims" even though most state statutes classify claims in this priority class by the type of claim[6] as opposed to the type of claimant) over claims of the United States is rendered useless because of the holding by the Court of Appeals. Only with claim bar dates that are

[6] *See* NAIC Insurer Rehabilitation and Liquidation Model Act (Model Act) § 47C (All claims under policies including claims of the federal and any state or local government for losses incurred, ("loss claims") including third party claims.) 3 NAIC Model Laws at 555-53 (Note reference is to page 53 of Model 555).

enforceable as to all claimants, including the United States, can a state as receiver pay any claims without fear of violating the Federal Priority Act. This is so because a federal claim can be filed at any time for any amount as (a) a policy-related claim (which would be in the highest priority of claims, after administrative costs), or (b) a general claim (in a lower priority under most state statutes), against an insolvent insurer's estate. If a state as receiver uses all of the estate's assets to pay claims under policies and, after that, the United States files a policy-related claim, then the state as receiver could be liable, pursuant to the Federal Priority Act, 31 U.S.C. § 3713(b).

If it were not possible for the United States to have policy-related claims, then there would be less of a problem created by the decision by the Court of Appeals that the United States can file its claims at any time. In insurer receiverships that only have enough assets to pay the claims in the policy-related claims priority class, *Fabe* would then operate to bar the claims of the United States in the lower priority classes. However, as the United States District Court for the District of Massachusetts, in *Ruthardt v. United States*, 164 F. Supp. 2d 232 (D. Mass. 2001) noted, the opinion in *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993), which the Court of Appeals followed in this case, "seems to have been insufficiently sensitive to the fact that late-filed federal [policy-related] claims may substantively, and rather directly, interfere with the timely and orderly distribution of funds

to general policyholder creditors." Br. for Pet'r App. at 40a.[7]

The practical effect of the decision by the Court of Appeals regarding the claims bar date issue is that claimants in hundreds of insurer receiverships will not be paid distributions that would otherwise have been made. *See* NAIC, 2002 Contact List For Insurers In Receivership (Aug. 2002) and Contact List For Insurers In Receivership (Aug. 2002), *both at* http://www.naic.org/receivership/ (last visited Feb. 24, 2003). It is likely that claims worth several billions of dollars in the aggregate will go unpaid until this issue is resolved. *See* NAIC List Regarding General Contacts And Related Web Pages *at* http://www.naic.org/receivership/documents/StateReceivershipGeneralContact1-7-3.xls (last visited Feb. 24, 2003).[8] *See also* NAIC Report on Receiverships (1999) (Publication containing summary information on receiverships including amounts claimed in each receivership estate by state in most instances). Further, a state may have no ongoing domestic receiverships and still have many claimants with claims against insurer receivership estates that were domiciled in other states. Thus, every state is likely to have many claimants impacted by the hold on payments resulting from the decision by the Court of Appeals.

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[7] Citations in the form Br. for Pet'r App. are to the Appendix for the Massachusetts Petition for Writ of Certiorari. Citations in the form Br. for Pet'r SGA App. are to the Appendix for the Petition for Writ of Certiorari by the Petitioning SGAs.

[8] There are links at this Web page to specific state Web pages that list receiverships or provide information on particularly significant receiverships.

It is not only a delay in payment that will be caused, but also a decrease in the amount paid at distribution. The reduction results from these insurer receivership estates having to be open longer, which increases administrative expenses, as well as the additional expenses related to litigating these issues with the United States. Every dollar of administrative expenses is a dollar that cannot be paid out in distributions.

B. The States Are Impacted Through The Loss Or Delay In Revenue Through Premium Tax Offsets

This decision by the Court of Appeals will have an impact on the revenues of many states in decreased or delayed premium tax collections through increased premium tax offsets. Delays in distributions to state guaranty associations increase the net assessments made by the associations on their member insurers. *See, e.g.*, Mass. Gen. L. Ch. 175D, § 5(1)(c) (2000). Distributions made to the state guaranty associations either (a) get returned to the insurers originally assessed to cover the costs of a past insurer insolvency, or (b) are used to decrease the amount currently being assessed on member insurers to cover the costs of current insurer insolvencies. In either event, such distributions decrease the net amount that member insurers pay in assessments. This, in turn, decreases the amount of premium tax offset taken in those states that provide for a premium tax offset. A premium tax offset allows an insurer to reduce the premium taxes it would otherwise pay to the state by offsetting (usually over a

period of five years) the guaranty association assessments it has paid in prior years.[9]

In this area of impact also, it is not only a delay in payment, but also a decrease in the amount paid at distribution that will result from these insurer receivership estates having to be open longer with increased administrative and litigation expenses.

C. The States Are Impacted Through The Incentive Provided The United States To Withhold Releases Until Accruals Allow For Distributions On Lower Priority Claims Of The United States

The "absolute priority rule" provides, "[e]very claim in each class shall be paid in full or adequate funds retained for such payment before the members of the next class receive any payment." 3 Model Laws at 555-63 (Model Act § 47), *see also*, Mass. Gen. L. Ch. 175, § 180F (2000); Br. for Pet'r App. at 58a. Insurer receivership estates generally have invested assets that generate income to the estate. If no distributions are made to claimants, then this income accrues on all of the assets remaining in the estate. Eventually, the assets of the estate increase to the point

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[9] A summary of these provisions for property and casualty insurers is provided in the National Conference of Insurance Guaranty Funds – 2002 Summary of Property & Casualty Insurance Guaranty Association – Acts of the Various States and US Territories – Summary by Provision (2002), *at* http://www.ncigf.org/ (last visited Feb. 24, 2003). A summary of these provisions for life and health insurers is provided in the publication NOLHGA – State Laws & Provisions Report – Tax Offsets (Dec. 20, 2002), *at* http://www.nolhga.com/stateinformation/main.cfm (last visited Feb. 24, 2003).

that the claims in the higher priority classes can be paid in full such that, in accordance with the absolute priority rule, claims in lower priority classes can then be paid at least partially. The Court of Appeals holding regarding claim bar dates gives the United States the ability to cause or prevent all distributions from insurer receivership estates, by giving or withholding releases. If the United States has claims in the lower priority classes, which is likely, then the United States has an incentive to withhold releases as to its claims against the estate. This is not to say that this is currently being done or is even currently a factor in any particular matter. It is enough that the incentive to do this is created by the decision by the Court of Appeals that clarification by this Court is now required.

It should not be viewed that this incentive to withhold releases and cause full payment of higher priority claims alleviates the increased administrative and litigation expenses being incurred as a result of this decision by the Court of Appeals. The reality is that the higher priority claimants, all of which, generally, will be in the policy-related claim priority class, are still incurring these expenses, but are doing so indirectly in the form of interest free loans to the estate in the amount of what would be their timely paid claims.

D. The States Are Likely To Be Impacted To A Greater Extent In The Future As More Claims By The United States In Insurer Receiverships Are Brought About Through Recent Enactments

The implications of the Gramm-Leach-Bliley Act (GLBA), Pub. L. No. 106-102, 113 Stat. 1338 (Nov. 12, 1999), further illustrate the importance for the Court to

resolve the issues at the center of this dispute. In repealing Depression-era restrictions, GLBA permits affiliations among insurers, depository institutions, and securities firms.[10]

By permitting insurers, depository institutions, and securities firms to affiliate through a financial holding company structure,[11] GLBA clearly envisions the formation of financial services conglomerates. Because the insurance activities of "any person . . . shall be functionally regulated by the states," 15 U.S.C. § 6711 (Supp. 2001) insurers and other entities engaging in the business of insurance will remain subject to state regulation, including state solvency regulation. Because of the expectation through GLBA of increased affiliations among insurers and other financial services providers – many of which, depository institutions particularly, are subject to federal regulation – there exists an increased likelihood that through these affiliations, insurers may be subject to an increased frequency of federal claims against a receivership estate in the event of an insurer insolvency.

The recently enacted Terrorism Risk Insurance Act of 2002 (TRIA), Pub. Law 107-297, 116 Stat. 2322 (Nov. 26, 2002), also portends of an increased number of federal claims against insolvent insurance companies. The Terrorism Insurance Program established by TRIA provides that the federal government will pay a share of losses in the

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[10] *See* Gramm-Leach-Bliley Act (GLBA), Pub. L. No. 106-102, § 101, 113 Stat. 1338, 1341 (Nov. 12, 1999).

[11] *See* GLBA, Pub. L. No. 106-102, § 103, 113 Stat. 1338, 1342-1351 (Nov. 12, 1999).

event of a defined "act of terrorism" where insured losses exceed certain thresholds noted within the act. Sections 103(e)(7) and 103(e)(8) include provisions indicating conditions under which federal assistance to insurers shall be subject to a mandatory recoupment through premium surcharges on insurance policies. 116 Stat. at 2329-2330. Of particular relevance to the issues at hand, the recoupment program raises the specter of federal claims against a receivership estate for federal assistance received for terrorism-related losses by insurance companies. Therefore, TRIA further demonstrates the need for the Court to resolve these issues. The trends clearly favor more federal claims against insurer receivership estates, not less.

II. THE APPLICATION OF BAR DATES TO THE UNITED STATES IS AN IMPORTANT AND RECURRING QUESTION THAT SHOULD BE SETTLED BY THIS COURT

While Petitioners' explain how the decision by the Court of Appeals will impact insurer receivers and claimants in all states and is therefore of compelling national interest (and the NAIC supplements that explanation), it should be added that these are questions that should be settled by this Court because the issues arise not from the plain wording of the statutes at issue, but from the way in which those statutes have been construed by the Court of Appeals in *Garcia* and in this case.

Garcia did not follow *Fabe* (which was based on the plain wording of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.* (West 1997)), but rather followed the narrower judicially created insured-insurer test: "statutes aimed at protecting or regulating this relationship [between insurer and insured], directly or indirectly, are laws

regulating the 'business of insurance' within the meaning of the phrase." *SEC v. Nat'l Securities, Inc.*, 393 U.S. 453, 460 (1969).

Also, with regard to the claims bar date issue, "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Supreme Court Rule 10(b). The state court of last resort with which the Court of Appeals decision conflicts in this instance is the Supreme Court of West Virginia, which in regard to this important federal question has held that:

> [subordinating late filed claims to a lower priority class in the priority of claims] sufficiently protects policyholders so that, under the McCarran-Ferguson Act, it reverse preempts the federal priority statute found at *31 U.S.C. § 3713.* Accordingly, for the foregoing reasons, we hold that *W. Va. Code § 33-24-27 (1996)* (Supp. 1998), which specifies the order of distribution for claims against the liquidated estate of certain insolvent insurance companies [and subordinates late-filed claims], is a law that was enacted for the purpose of regulating the business of insurance in that it operates to protect the claims of policyholders.

State ex rel. Clark v. Blue Cross Blue Shield of West Virginia, Inc., 510 S.E.2d 764, 785-86 (W. Va. 1998). This directly conflicts with the holding of the Court of Appeals in this matter. Br. for Pet'r App. at 14a-18a. It also conflicts with the holding in *Garcia* that a Puerto Rico bar date was preempted by the Federal Priority Act despite the McCarran-Ferguson Act because the bar date was "neither directed at, nor necessary for, the protection of policyholders. . . . The provision helps policyholders only to

the extent that (and in the same way as) it helps all creditors." *Garcia*, 4 F.3d at 62.

The Court of Appeals at several points incorrectly concluded that only Congress could address this issue of claims bar dates not applying to the United States. First, it noted, "it may be useful to Congress for us to explain why the policy ought to be reconsidered." Br. for Pet'r App. at 17a. This followed its statement that "giving the United States an open-ended exemption from deadlines [bar dates] is (in the liquidation context) simply terrible public policy." Br. for Pet'r App. at 16a. The Court of Appeals appears to have ignored the possibility that this "terrible policy" may be the result of judicial interpretations. Second, after noting "some uniform limit is clearly needed," it concluded that "Congress could easily fix the problem, as it had already done for ordinary bankruptcies. (citations omitted) But this is a matter for the legislature, not the courts." Br. for Pet'r App. at 17a. This ignored the more likely prospect that Congress will take the view that it has already "fixed the problem" by enacting McCarran-Ferguson.[12] It also ignores that this Court can reverse the

[12] Regarding the purpose of the McCarran-Ferguson Act the legislative history has the following: "What we have in mind is that the insurance business, being interstate commerce, if we merely enact a law relating to interstate commerce, or if there is a law now on the statute books [as was the Federal Priority Act] relating in some way to interstate commerce, it would not apply to insurance. We wanted to be sure that the Congress, in its wisdom, would act specifically with reference to insurance in enacting the law." (statement of Sen. Ferguson). 91 Cong. Rec. 1487 (1945). To that was added, "no existing law and no future law should, by mere implication, be applied to the business of insurance." (statement of Sen. O'Mahoney). *Id. See also Fabe,* 508 U.S. at 507 n.7.

decision by the Court of Appeals in this case and can overrule *Garcia* and its misapplication of *Fabe* and misinterpretation of McCarran-Ferguson. Third, the Court of Appeals concluded by admonishing, "If the Department of Justice cannot find the time to draft a proper amendment, it will simply encourage judicial self-help, however misguided that may be." Br. for Pet'r App. at 18a. The Department of Justice does not need to draft an amendment; rather, this Court should recognize that this "terrible policy" arises from judicial interpretations and not from the plain wording of McCarran-Ferguson as was followed in *Fabe*.

III. THE COURT OF APPEALS MISAPPLIED THE STANDARDS AND PRINCIPLES OF *FABE* AND THE PLAIN WORDING OF THE MCCARRAN-FERGUSON ACT

The Court of Appeals correctly declared that, "Prior to *Fabe*, the touchstone of McCarran-Ferguson protection was the insurer-insured contract." Br. for Pet'r App. at 10a. It also correctly interpreted *Fabe* to mean provisions "that indirectly assure that policyholders get what they were promised can also trigger McCarran-Ferguson protection; the question is one of degree, not of kind." Br. for Pet'r App. at 10a-11a. But, in regard to bar date provisions it ignored this and the holding in *Fabe* that provisions "reasonably necessary to further the goal of protecting policyholders," *Fabe*, 508 U.S. at 508-09 also trigger this protection.

Both Petitioners adequately point out that this broader post-*Fabe* test has been applied in other United States Circuit Courts in the insolvency context, but was ignored by the Court of Appeals in this case in regard to

the claims bar date exemption it granted to the United States. Br. for Pet'r at 21-29, Br. for Pet'r SGA at 7-14. The SGA Petitioners add that this broader interpretation of laws that are for the "purpose of regulating the business of insurance" has also been applied by this Court, outside of the insolvency context. Br. for Pet'r SGA at 14-16.

Regarding the argument that "[p]lenary review is further supported by the significant impact of the ruling below on federalism," Br. for Pet'r at 19, there is more to note. First, in addition to Massachusetts adopting receivership provisions as early as 1855, Mass. Stat., Ch. 124, § 8 (1855), many states had statutory provisions regarding receivership for and the liquidation of insurers long before the enactment of the McCarran-Ferguson Act in 1945.[13] This is reflected in cases such as *Relfe v. Rundle*, 103 U.S. 222 (1881), and *Clark v. Willard*, 292 U.S. 112 (1934), in which insurer receivership provisions have been construed. These cases also reflect how this Court has recognized the longstanding role of the states in conducting insurer receiverships. Br. for Pet'r at 19-20. The NAIC Proceedings demonstrate that states have acted as receivers of insurers at least from the beginnings of the NAIC in

[13] Since 1936, progressively more complete versions of the Model Act have served as a guide for NAIC member states in discharging their duties as rehabilitators and liquidators of insurers. In 1936, the NAIC adopted an early draft version of the Uniform Insurance Liquidation Act, 13 U.L.A. 321 (Master ed. 1986) ("UILA"), as its Model Act. *See* 1 Proc. of the Nat'l Ass'n of Ins. Comm'rs 29 (1936).

In 1969 the NAIC adopted the Wisconsin Insurers Rehabilitation and Liquidation Act, Wis. Stat. § 645 (1968), as its model act instead of the UILA. *See* 1 Proc. of the Nat'l Ass'n Ins. Comm'rs 168, 241, 271 (1969). The Wisconsin Statute provides the basis for the current Model Act.

1871, if not earlier. *See* 1 Proc. of the Nat'l Ass'n of Ins. Comm'rs 18, 25, 123, 179 (1871).

Second, the states' longstanding practice of chartering or otherwise giving birth to insurers seems to carry with it the need to provide procedures for winding-up the affairs of insurers when their liquidation or burial becomes necessary. In *Fabe*, this Court described the Ohio priority statute as a provision "enacted as part of a complex and specialized administrative structure for the regulation of insurance companies from inception to dissolution." 508 U.S. at 494. In this case, the Court of Appeals declared "[t]he priority that Massachusetts affords to guaranty funds is part and parcel of an integrated regime aimed at protecting policyholders." Br. for Pet'r App. at 11a. The priority and bar date provisions are interdependent parts of a highly integrated regulatory system that truly does regulate insurers from birth to burial. Br. for Pet'r at 20.

Allowing the United States as a claimant to veto the application of claim bar dates – one of the most critical provisions in the complex and specialized administrative regime aimed at protecting policyholders – will result in the entire purpose of such statutes, i.e., the payment of claims, being completely frustrated. This should strike no one as a proper operation of federalism in the insurance regulatory context.

IV. THE STANDARDS AND PRINCIPLES SET OUT IN *FABE* NOW REQUIRE CLARIFICATION

Prior to *Fabe*, state insurance receivers were not sure if they could pay any of the claims against, or even the administrative expenses of, the insurer receivership estates that they were required by state law to administer

without the fear of violating the Federal Priority Act. After *Fabe,* insurance receivers believed they could pay policy related claims without fear of becoming personally liable, or of causing liability to their state by the performance of their statutory duties on behalf of the state, because the general claims of the United States would not take a super-priority above all other claims. The Court of Appeals, by deciding that the United States is not subject to claim bar dates, has resurrected the peril of becoming liable to the United States. This is a compelling case of national interest where this Court can address the apparent confusion in the lower courts in applying the plain meaning of the McCarran-Ferguson Act based on *Fabe.*

CONCLUSION

For the reasons stated above, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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(6)

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In The Supreme Court of the United States

JULIANNE M. BOWLER, in her capacity as COMMISSIONER OF INSURANCE OF THE COMMONWEALTH OF MASSACHUSETTS and PERMANENT RECEIVER OF AMERICAN MUTUAL LIABILITY INSURANCE COMPANY and AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,

Petitioner,

v.

UNITED STATES and JOHN ASHCROFT, in his official Capacity as ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

NATIONAL ORGANIZATION OF LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATIONS' *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

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WRITTEN CONSENT TO FILE *AMICUS CURIAE* BRIEF

In accordance with Supreme Court Rule 37.2(a), all parties consented to the filing of this *amicus curiae* brief, in writing. The written consents accompany this brief.

INTEREST OF THE *AMICUS CURIAE*

The *amicus curiae*, the National Organization of Life and Health Insurance Guaranty Associations ("NOLHGA"),[1] is a not-for-profit corporation domiciled in Virginia whose members are the life and health insurance guaranty associations of the 50 states, the District of Columbia and Puerto Rico. NOLHGA is the national association representing all of the state life and health insurance guaranty associations. These statutorily created entities provide protection and benefits to policyholders of insolvent life and health insurance companies. A significant source of funding for those policyholder benefits is the policyholders' pro rata share of the remaining assets of the insolvent insurance company. In order to recover those assets, the policyholders and the guaranty associations rely on a claims filing deadline applied to all creditors. Exempting a creditor, in this case the United States, from

[1] This brief was authored in whole by undersigned counsel for NOLHGA. No person, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of the brief. *See* Supreme Court Rule 37.6.

the claims filing deadline, prevents the use of the insolvent insurer's assets to pay policyholder benefits.[2]

NOLHGA was formed to coordinate its member guaranty associations' activities in life and health insurance insolvencies, particularly in complex insolvencies affecting many states. Certain of NOLHGA's member insurance guaranty associations have claims in the American Mutual Liability Insurance Company insolvency, though the claim amounts are small compared to the claims of the property and casualty guaranty funds.[3] Notwithstanding the relative amount of life and health insurance claims in this liquidation, the issue that is the subject of the petition for writ of certiorari is one of paramount importance and enormous, long-term, financial consequences to NOLHGA's member guaranty associations. The decisions below, exempting the United States from a claims filing deadline, threaten a core component of the regulation of the business of insurance – the use of

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[2] On page 17 of its Petition for Writ of Certiorari, the Petitioner confirmed that, "Receivers thus cannot make distributions to policyholders or other creditors unless they can obtain a waiver from the United States."

[3] There are two different guaranty entities that protect policyholders from insurer insolvencies. Guaranty associations provide coverage to policyholders in life and health insurance insolvencies. The enabling statutes for guaranty associations are based on the National Association of Insurance Commissioners ("NAIC") Model Life and Health Insurance Guaranty Association Act. Guaranty funds provide coverage to policyholders in property and casualty insurance insolvencies. The enabling statutes for property and casualty guaranty funds are based on the NAIC Model Property and Casualty Post-Assessment Guaranty Association Act.

assets of an insolvent insurer to pay policyholder benefits on a priority basis.

NOLHGA appeared and participated as an *amicus curiae* before the United States District Court for the District of Massachusetts and before the United States Circuit Court of Appeals for the First Circuit. Each court rendered a decision that prevents the use of assets from an insolvent insurer to pay policyholder benefits by exempting the United States from the claims filing deadlines for insurer insolvencies. This restriction is a recurring question of national import that will affect every insurer insolvency in the country. It is on this issue that NOLHGA seeks to present argument as an *amicus curiae* before this Court.[4]

SUMMARY OF THE ARGUMENT

Exempting the United States from a claims filing deadline in insurer insolvencies is a terrible public policy that prevents using estate assets to pay policyholder insurance benefits. Determining whether the claims filing deadline applies to the United States requires an interpretation of "reverse preemption" under the McCarran Ferguson Act, 15 U.S.C. §1017 as applied by this Court in *United States Dep't of Treasury v. Fabe*, 508 U.S. 491

[4] The Alabama Insurance Guaranty Association, et al., also have submitted a Petition for Writ of Certiorari on the same issue based on the same underlying decisions in Case Number 02-1135. NOLHGA also supports the granting of that Petition for the same reasons set forth herein.

(1993).[5] The First Circuit, in *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993), followed an approach unduly restricting this Court's decision in *Fabe* in determining that the claims filing deadline does not apply to the United States.

The legal authorities from jurisdictions around the country are split as to whether the United States is bound by the claims filing deadline in insurer insolvencies. The First Circuit Court of Appeals has concluded that the claims filing deadline for insurer insolvencies does not apply to the United States. Courts in other jurisdictions have concluded that the United States is subject to the claims filing deadline for insurer insolvencies. Courts of Appeal in other Circuits have rejected the legal reasoning relied on by the court in *Garcia*.

Exempting the United States from a claims filing deadline prevents using assets of an insolvent insurer to pay policyholder benefits. Under the state policyholder protection system, the receiver must pay the assets of the insolvent insurer on a pro rata basis to creditors based on the creditors' priority level. Policyholders and guaranty funds make up the largest priority level of creditors, after administrative expenses, to be paid in insurer insolvencies. Often, they are the only priority level, other than administrative expenses, to receive assets of the insolvent insurer. In order to make the required pro rata payment, the receiver must know the total amount of the claims in

[5] Under the McCarran Ferguson Act, 15 U.S.C. §1012, a federal statute is "reverse preempted" by a state statute where the state statute relates to the business of insurance but the federal statute does not relate to insurance.

the priority level for comparison to the amount of remaining assets. Exempting the United States from the claims filing deadline prevents the receiver from determining the total amount of claims because they are always subject to change. This is particularly true here where the United States maintains that it has policyholder level claims that are not subject to the claims filing deadline. While the receiver is unable to calculate the total amount for claims, the receiver cannot make a distribution of estate assets for the payment of policyholders.

ARGUMENT

I. Exempting the United States from the claims filing deadline prevents the use of assets from an insolvent insurer to pay policyholder benefits.

The underlying legal question raised in the petition for writ of certiorari is whether a claims filing deadline in insurer insolvencies applies to the United States. The First Circuit Court of Appeals addressed this issue in *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993). There, the court decided that the claims filing deadline did not apply to the United States because the claims filing deadline was "neither directed at, nor necessary for, the protection of policyholders. . . . The provision helps policyholders only to the extent that (and in the same way as) it helps all creditors." *Id.* at 62.

The district court below concluded that it was "bound" by *Garcia* and held that the claims filing deadline does not apply to the United States. However, in doing so, the court expressed concerns about the underlying basis and

rationale for the *Garcia* decision. The district court concluded that there "is a compelling argument for the proposition that benefits are awarded policyholders by a state filing deadline in liquidation proceedings." App. 40a.[6] Specifically, the court determined that the *Garcia* decision "seems to have been insufficiently sensitive to the fact that late-filed federal policyholder claims may substantively, and rather directly, interfere with the timely and orderly distribution of funds to general policyholder creditors." *Id.*

In this case, the First Circuit Court of Appeals also determined that it was bound by *Garcia*. App. 15a. Similar to the district court, the First Circuit raised concerns about the underlying rationale for *Garcia*. The court stated that "giving the United States an open-ended exemption from deadlines is (in the liquidation context) simply terrible public policy and was almost certainly not the result of any considered judgment by Congress." App. 16a-17a. In the First Circuit's own words, "Some uniform limit is plainly needed." App. 17a.

The *Garcia* decision did not give full consideration to the effect that a claims filing deadline has on the performance of insurance contracts in an insurer insolvency. It concluded that a filing deadline "is not necessary for liquidation" and it offers only "indirect, speculative" benefits for policyholders. *Id.* at 62. As the district court identified here, the "*Garcia* panel may have understated the disruption which an open-ended opportunity for federal government claims has upon insurance liquidation

[6] Citations are to the Appendix for the Petition for Writ of Certiorari.

proceedings." App. 37a-38a. Without a deadline for claims, "a receiver will not be willing to make a final distribution because the prospect of unanticipated claims would render impossible a final determination." App. 38a. It is the policyholders who will be affected by this delay and the payments for their policy claims that will be withheld. Thus, as the district court stated, "[t]here is a compelling argument for the proposition that benefits are accorded policyholders by a state filing deadline in liquidation proceedings." App. 40a.

This case demonstrates that the policyholder claims of an insolvent insurer will not be paid in the absence of a claims filing date enforced against all creditors, including the United States. The receiver cannot close the insolvency and pay policyholders while the United States refuses to adhere to a claims filing deadline, particularly when the United States may have unasserted policyholder claims. As a result, assets of the insolvent insurer that should be used to provide benefits to policyholders are held up while the United States either cannot or will not identify its claims.

In following *Garcia,* the decisions of the district court and the First Circuit were contrary to this Court's decision in *United States Dep't of the Treasury v. Fabe*, 508 U.S. 491, 500 (1993). In *Fabe*, this Court held that state legislatures may grant priority to claims for administrative expenses and claims of policyholders over claims of the United States in an insurer liquidation. *Id.* at 508-09. In its ruling, this Court reasserted that, with respect to policies, their "reliability, interpretation, and enforcement . . . were the core of the 'business of insurance.'" *Id.* at 501 (*citing SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 460 (1969)). With the critical focus on the relationship between

policyholder and insurer, the Court left "no doubt that the actual performance of an insurance contract falls within the 'business of insurance.'" *Id.* at 503. State statutes "designed to carry out the enforcement of insurance contracts by ensuring the payment of policyholders' claims despite the insurance company's intervening bankruptcy" are laws enacted "for the purpose of regulating the business of insurance." *Id.* at 504.

In *Fabe*, this Court recognized the pragmatic necessity of insolvency administration to protect policyholders. Acknowledging that policyholders would not get paid in the absence of the administration of an insolvent insurer, this Court held that administrative expenses properly could be paid before claims of the federal government. *Fabe*, 508 U.S. at 509. "Without payment of administrative costs, liquidation could not even commence." *Id.* That other creditors might benefit from the payment of administrative costs was irrelevant to the Court. Just as a liquidation cannot be commenced without the payment of administrative costs, a liquidation cannot be concluded without the enforcement of a claims filing deadline. Final payments at the policyholder level cannot be made without absolute certainty as to whether there are unpaid claims of an equal or higher priority. Thus, the United States' unasserted policyholder level claims interfere with and prevent payments to policyholders so long as the United States is not subject to a claims filing deadline.

II. The legal authorities are split as to whether a claims filing deadline in insurer insolvencies applies to the United States.

Courts from other jurisdictions not bound by the *Garcia* decision have expressed the same concerns as those

raised by the lower courts here and rejected the approach from *Garcia*.

In *Boozell v. United States*, 979 F. Supp. 670, 675 fn. 3, 677-79 (N.D. Ill. 1997), the United States District Court for the District of Illinois rejected *Garcia* and applied a claims filing deadline to the United States because it directly or indirectly assisted policyholders. Similarly, in *Clark v. Blue Cross Blue Shield of West Virginia, Inc.*, 510 S.E. 2d 764, 785-86 (W. Va. 1998), the West Virginia Supreme Court rejected *Garcia* and upheld the subordination of late-filed United States' claims because it protects claims of policyholders.

In addition, other decisions reject the legal analysis developed by the First Circuit in *Garcia* that, to be reverse preempted, a state statute such as the claims filing deadline must be either directed at or necessary for the protection of policyholders. App. 17a. Under *Garcia*, a provision that helps policyholders only to the extent it helps all creditors would not be reverse preempted. *Id.* In direct contravention to that approach, the Second, Fifth and Tenth Circuits each rendered an opinion upholding reverse preemption even where creditors other than policyholders would also benefit from the state statute. *Stephens v. American Intern Ins. Co.*, 66 F.3d 41, 45 (2nd Cir. 1995) (holding that anti-arbitration provision in the state's insurer insolvency liquidation scheme reverse preempted the Federal Arbitration Act); *Munich Am. Reins. Co. v. Crawford*, 141 F. 3d 585, 594 (5th Cir.), *cert. denied*, 525 U.S. 1016 (1998) (statute authorizing injunctions against actions that interfere with insurer receiverships reverse preempted Federal Arbitration Act); *Davistar Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277, 1281 (10th Cir. 1998), *cert. denied,* 525 U.S. 1177 (1999) (upholding a

Utah statute that consolidated all claims against a liquidating insurer in the supervising state court, reverse preempting the Federal Arbitration Act). Contrary to *Garcia*, the Tenth Circuit explained that offering benefits to other creditors neither diminished nor denigrated the ultimate purpose of protecting policyholders. *Davistar*, 152 F. 3d at 1281.

III. Exempting the United States from the claims filing deadline impairs the state policyholder protection system.

The state policyholder protection system relies on using assets of the insolvent insurer to pay policyholder level creditors. As explained below, exempting the United States from a claims filing deadline prevents those payments and impairs the state policyholder protection system.

The policyholder protection system established by Massachusetts and other state legislatures has two principal and inter-related statutory frameworks – the insurer liquidation act and the relevant guaranty fund laws. These two statutory frameworks operate together to protect policyholders of insolvent insurers and are central elements of each state's regulatory system. *North Carolina Life and Accident and Health Ins. Guar. Ass'n v. Alcatel*, 876 F. Supp. 748, 753 (E.D. N.C. 1995); *Metro. Life Ins. Co. v. Bd. of Dir. of Wisconsin Ins. Sec. Fund*, 572 F. Supp. 460, 470 (W.D. Wis. 1983).

A. The Liquidation Act.

Upon entry of an Order of Liquidation, the state insurance commissioner is appointed receiver of the

insolvent insurer and charged with liquidating the business of the insurer. Mass. G.L. c. 175, §180C. The rights and liabilities of the insolvent insurer and the policyholders, creditors and others interested in the insolvency become fixed according to law on the date of insolvency. *Id.* Subject to the state liquidation court approval, the receiver is directed to dispose of the insurer's property. *Id.*

The proceeds from the sale of the insolvent insurer's assets are distributed to the insurer's creditors based on a statutory priority scheme. Mass. G.L. c. 175, §180F. The receiver is directed to provide notice to the insurer's creditors of a claims filing deadline – the last date fixed by the state liquidation court by which all claims against the insolvent insurer must be filed. *Id.* The claims are then prioritized into the following general classes:

(1) expenses of administration;

(2) claims of policyholders and guaranty funds;

(3) claims for return of premiums;

(4) claims of the federal government other than those included in class 2 or 3;

(5) compensation of employees for services rendered within three months prior to the commencement of a proceeding;

(6) certain claims for taxes and debts to any state or local government; and

(7) all other claims.

See Id.

Thus, the receiver is required to liquidate the insolvent insurer's assets and distribute the proceeds from

those assets to the insolvent insurer's creditors based on the Massachusetts priority statute. The establishment and enforcement of a claims filing deadline is a pragmatic necessity for distributing the insolvent insurer's assets. Before final payment can be made to policyholders and other creditors, the receiver must be able to make a final determination regarding the amount and priority of claims in order to make the appropriate pro rata allocations. If the United States is not subject to a claims filing deadline, then the receiver cannot make a final determination on claim amounts, preventing a pro rata distribution of estate assets to policyholders.[7]

B. The Guaranty Fund Act.

Guaranty funds are nonprofit legal entities, treated as insurers in certain respects,[8] created by statute and comprised of all insurers licensed in the state. Mass. G.L. c. 175D, §3 and c. 175, §146B(6)(A).

For purposes of the issues raised in this case, there are three critical functions served by guaranty funds in the policyholder protection system. These three critical functions respond to what have been referred to as the "three abiding principles" to protect policyholders in the event of an insurer insolvency. *See* Christopher J. Wilcox, "The U.S. Guaranty Association Concept at 25," 14 *Journal of Insurance Regulation* 370 (Spring 1996). First is the

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[7] The Receiver faces personal liability for violations of the federal priority statute. 31 U.S.C. §3713(b).

[8] *See e.g.* Mass. G.L. c. 175D, §10, c. 175, §§146B(8)(L)(vi) and 146B(6)(B).

policyholder's loss of risk protection. When an insurer becomes insolvent, policyholders discover that risks they thought had been transferred to an insurer were not transferred at all. *Id.* Second is the insufficiency of funds. In an insolvency, the insurer does not have enough money to pay all policyholder benefits or claims. "Characteristically, in the past the dividends in liquidations have probably averaged less than 50 cents on the dollar." *Id.* Third is the delay in the amount of time it takes for the remaining assets of an insolvent insurer to be applied to the benefit of policyholders. An insurance insolvency could last seven years or even longer. *Id.*

1. Guaranty funds protect the transfer of risk for the policyholders.

Subject to certain statutory limitations, the guaranty funds provide coverage for insurance policies and contracts of the insolvent insurer. Mass. G.L. c. 175D, §5 and c. 175, §146B(4). When an insurer is placed into liquidation, the insurer has breached its promise to assume the risks of the policyholder (e.g., risk of injury, property loss or death). The risk transfer that the policyholder paid for and is relying on has failed. At that point, the guaranty fund steps in and assumes the policyholder's risk, paying covered claims or continuing coverage under the policies. Mass. G.L. c. 175D, §§5 and 1 and c. 175, §§146B(8)(C) and 146B(2). Up to the statutory coverage limits, the guaranty fund pays the insurance benefits that the insolvent insurer is no longer able to pay.

The transfer of this coverage and assumption of risk to the guaranty funds does not relieve the insolvent insurer from the consequences of the financial failure. The

company's legal obligations to policyholders continue. The guaranty fund is assigned the claim of the policyholder up to the amount of benefits or coverage the guaranty fund provides. To the extent the policyholder had a claim against the insolvent insurer for a share of that insurer's assets, that claim is assigned to the guaranty fund. Mass. G.L. c. 175D, §8.[9]

Policyholder claims against an insolvent insurer are enormous; debts to policyholders represent the overwhelming majority of claims against an insurer, and the assets are often totally depleted at the policyholder level. Policyholder claims consist of two components. Claims covered by a guaranty fund ("covered claims") are those claims that the state legislatures have determined, in their regulation of the business of insurance, will be paid by guaranty funds. That coverage is funded, in part with assets recovered from the insolvent insurer based on the guaranty funds' statutory assignment rights derived from the policyholders. The balance of guaranty fund coverage costs is generally paid by assessments. Claims not covered by a guaranty fund ("uncovered claims") are those claims that the state legislatures have determined will be paid solely from a policyholder's pro rata share of estate assets and not by the guaranty funds. Thus, it is the policyholder level creditors that will not be paid if the United States is exempt from a claims filing deadline and the receiver is unable to distribute assets of the insolvent insurer.

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[9] Assignment language also has been enacted with respect to the Massachusetts life and health insurance guaranty association. Mass. G.L. c. 175, §146B(8)(K).

2. Guaranty funds rely on the insolvent insurer's assets to pay policyholder benefits.

The guaranty funds pay for policyholder coverage and benefits when an insolvent insurer does not have the money to do so. By means of statutory assignment, one critical source of money for the guaranty funds to provide this benefit is the distribution of assets from the insolvent insurer. The amount of those assets is usually insufficient to cover policyholder claims, and the shortfalls in estate assets are made up almost entirely of assessments imposed by the guaranty fund against its member insurance companies. Mass. G.L. c. 175D, §5(1)(c) and c. 175, §146B(9)(E). Thus, the insurance industry pays to provide the contractual benefits when one of its members fails. The insurance industry is permitted to recoup some of the costs of providing this coverage to policyholders of insolvent insurers by increasing premiums or offsetting a portion of the assessments against premium taxes over a period of time (in Massachusetts, five years). Mass. G.L. c. 175D, §13 and c. 175, §146B(13).

By this mechanism, the Massachusetts Legislature has made an important policy decision regarding the spreading of policyholder risks in an insurer insolvency. The initial brunt of the shortfall in estate assets is borne by the insurance industry. However, many of those costs will ultimately be passed on to insurance consumers in Massachusetts in the form of higher premiums and to the taxpayers in Massachusetts in the form of fewer premium taxes collected from insurers. In order to minimize the impact of assessments, the Massachusetts Legislature has established a limit – a maximum amount that the guaranty fund may assess against its member insurers – equal

to two percent of premiums per year. Mass. G.L. c. 175D, §5(1)(c) and c. 175, §146B(9)(E).

Thus, the amount of money available from assessments to fill the shortfall of an insurer insolvency and pay policyholder benefits is significant, but limited. The more money that is raised by assessments, the greater the impact on the insurance industry and, ultimately, on the insurance consumers and taxpayers of Massachusetts. Conversely, the more that the insolvent insurer's assets can be used to pay policyholders covered by guaranty funds, the less the guaranty funds' need for assessments.

3. Guaranty funds use the insolvent insurer's assets to provide quick payments and continuing coverage so the policyholders avoid the delays inherent in insurer insolvencies.

Guaranty funds resolve the delay faced by policyholders in an insurance insolvency by triggering coverage immediately upon the liquidation and substituting themselves for the policyholders in the claims process of the insolvent insurer. Thus, the burden of the delay suffered by the policyholders is transferred to the guaranty funds.

As an additional means of decreasing the delay, and to make certain that the estate assets are available as soon as possible to avoid the unnecessary use of guaranty fund assessment capacity, the Massachusetts Legislature has required that estate assets be distributed to the guaranty funds on an early basis so that those assets can be used to pay policyholder benefits. In the policyholder protection system, these payments are called "Early Access Distributions."

The liquidation statute requires the receiver to make application to the receivership court for a proposal to make Early Access Distributions to the guaranty funds within 120 days of the order of liquidation. Mass. G.L. c. 175, §180C. Such Early Access Distributions may be made only after the receiver has secured sufficient assets to address claims of a higher or equal priority (administrative expenses and policyholders). *Id.* The receiver can only make this reservation of assets if it has a reasonably accurate estimate of the administrative expenses and the policyholder claims. Information associated with these two categories is generally within the possession, if not control, of the receiver. However, if the receiver is subject to claims from the United States at any time, including claims by the United States as a policyholder, the receiver could not make distributions to the policyholder level creditors (including guaranty associations) because it would be impossible to estimate pro rata allocations of assets based on claim amounts.

With the above scheme, Massachusetts has established a legislative balance of interests to finance the policyholder protection system and pay insurance benefits to policyholders. The link between guaranty fund coverage for policyholders and the use of assets of an insolvent insurer to pay those policy benefits is a critical component of that balance. If the United States is exempted from a claims filing deadline, that link will be severed because the assets of the insolvent insurer will not be available for payment to policyholders. After the link has been severed, the amount and timeliness of the benefits that guaranty funds provide to policyholders will be limited, undermining the state's scheme for protecting policyholders. Thus,

the reliability and enforcement of insurance policies will be impaired.

CONCLUSION

For the reasons stated above, NOLHGA supports the granting of a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

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Nos. 02-1124 and 02-1135

In the Supreme Court of the United States

JULIANNE M. BOWLER, COMMISSIONER OF INSURANCE OF MASSACHUSETTS, PETITIONER

v.

UNITED STATES, ET AL.

ALABAMA INSURANCE GUARANTY ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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27 pp

QUESTION PRESENTED

Whether the federal government is bound by claim-filing deadlines established by a state court under a state law relating to insurance company insolvency proceedings.

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In the Supreme Court of the United States

No. 02-1124

JULIANNE M. BOWLER, COMMISSIONER OF INSURANCE OF MASSACHUSETTS, PETITIONER

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a)[1] is reported at 303 F.3d 375. The decision of the district court (Pet. App. 21a-46a) is reported at 164 F. Supp. 2d 232.

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 02-1124.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2002. On October 11, 2002, the court of appeals denied the rehearing petition filed by petitioner in No. 02-1124 (Pet. App. 47a-48a). Petitioner in No. 02-1124 filed a petition for a writ of certiorari on January 27, 2003. On November 19, 2002, the court of appeals denied the petition for rehearing filed by petitioners in No. 02-1135 (Pet. App. 51a-52a). Petitioners in No. 02-1135 filed a petition for a writ of certiorari on January 28, 2003. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the relationship among the Federal Priority Statute, 31 U.S.C. 3713, the United States' immunity from state statutes of limitations, *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940), and the McCarran-Ferguson Act, 15 U.S.C. 1012(b), in the context of Massachusetts' insurance company insolvency scheme.

1. The Federal Priority Statute, 31 U.S.C. 3713, gives the federal government first priority for its claims against an insolvent entity's estate. It provides that a "claim of the United States Government shall be paid first when * * * a person indebted to the Government is insolvent and * * * an act of bankruptcy is committed." 31 U.S.C. 3713(a)(1)(A)(iii). It further provides that any representative of the estate who pays claims ahead of the United States' claims may be "liable to the extent of the payment for unpaid claims of the Government." 31 U.S.C. 3713(b). The statute has its roots in English common law, and some form of the statute has been in place since the Nation's founding. See *United States* v. *Moore*, 423 U.S. 77, 80-81 (1975).

The claims of the United States are not only entitled to a statutory priority, but are also beyond the reach of state limitations periods, unless Congress by statute provides otherwise. See *United States* v. *Thompson*, 98 U.S. 486, 488 (1878) ("a State statute cannot bar the United States"); *Summerlin*, 310 U.S. at 416 ("It is well settled that the United States is not bound by state statutes of limitations or subject to the defense of laches in enforcing its rights."); *United States* v. *Hoar*, 26 F. Cas. 329, 329 (C.C.D. Mass. 1821) (No. 15,373) (Story, J.) (deeming it "too plain for argument, that the statutes of limitations of Massachusetts cannot proprio vigore bind or bar the suits of the national government"). That rule has its roots in "the English law from a very early period," *Thompson*, 98 U.S. at 489; see *Hoar*, 26 F. Cas. at 330 (rule "has for several centuries universally prevailed"), and the United States' immunity to state limitations periods was "imparted to the new government as" one of the "incidents of the sovereignty" when "the national Constitution was adopted," *Thompson*, 98 U.S. at 489. The same principle is also reflected in the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2, which subjects the disposition of federal property (such as choses in action) to congressional control.

Finally, notwithstanding the general rule that federal statutes ordinarily preempt conflicting state laws, Congress has provided a presumption against statutory preemption of state laws regulating "the business of insurance." In particular, the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of

> insurance * * * unless such Act specifically relates to the business of insurance.

15 U.S.C. 1012(b). Congress passed the McCarran-Ferguson Act to address the unanticipated effects of *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), in which this Court held that the issuance of an insurance policy was a transaction in commerce and therefore subject to the federal antitrust laws. *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 40-41 (1996). The McCarran-Ferguson Act serves to protect state regulation of the business of insurance against inadvertent federal intrusion. *Id.* at 39.

2. The American Mutual Liability Insurance Company and American Mutual Insurance Company of Boston (collectively American Mutual) were declared insolvent in 1989. Pet. App. 22a-24a. Pursuant to state law, Mass. Gen. Laws ch. 175, § 180C, the Insurance Commissioner of Massachusetts (petitioner in No. 02-1124) was appointed permanent receiver in state court proceedings. Pet. App. 23a. Massachusetts law authorizes the state court supervising such proceedings to set a claim-filing deadline, although it does not impose any particular constraints on the choice of deadlines. Mass. Gen. Laws ch. 175, § 180F. The Massachusetts statute also provides the order in which claims are to be paid. See *ibid.*; Pet. App. 26a n.11. Under it, claims for administrative expenses are given first priority; the claims of policyholders, beneficiaries, insureds, and insurance guaranty funds are second; claims for the return of premiums are third; and claims of the United States (unless in a higher priority category) are fourth. Various other claims are assigned a lower priority. See *id.* at 26a n.11.

In March 1989, the receivership court ordered American Mutual's creditors to file their claims by March 9, 1990. Pet. App. 25a. The Department of Labor filed a claim for unpaid Longshore and Harbor Workers' Compensation Act assessments before the deadline, and other federal entities filed claims as well. Some federal claims were filed after the deadline, including claims under the Medicare Secondary Payer provision. *Id.* at 25a & n.7.

To facilitate the distribution of American Mutual's assets, the United States agreed to waive its rights under the Federal Priority Statute as to four early distributions to eligible state insurance guaranty funds as partial reimbursement of their claims against American Mutual's assets. (After paying the claims of an insolvent insurer's policyholders, state insurance guaranty funds often seek reimbursement from the insolvent insurer's estate.) Those early distributions totaled approximately $174 million, and by December 31, 1999, the guaranty funds had recovered about $308 million. Pet. App. 25a n.8; 02-1124 Pet. 13. The receivership court approved a proposed fifth distribution of about $10 million in 1999. The United States, however, declined to waive its priority rights for that distribution, because it was concerned that the remaining assets might be insufficient to cover its claims. Pet. App. 25a-26a. On May 14, 1999, the Massachusetts Insurance Commissioner filed a motion for approval of a liquidation plan "providing for denial of late filed claims," including those of the United States. *Id.* at 26a. That motion remains pending. *Id.* at 26a n.10.

On November 22, 2000, the Massachusetts Insurance Commissioner filed this declaratory judgment action against the United States and the Attorney General in his official capacity. The complaint described the action

as a suit "for non-monetary specific relief" with respect to "a federal agency's final action or failure to act." Compl. 2, ¶ 2. The complaint averred that, although the suit was against the United States and an officer in his official capacity, it was covered by the waiver of immunity contained in the Administrative Procedure Act, 5 U.S.C. 702, or was within this Court's holding in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). Compl. 2-3, ¶ 2.

The complaint sought a declaration that, by dint of the McCarran-Ferguson Act, 15 U.S.C. 1012, Massachusetts' priority for the claims of "insurance guaranty funds" is not preempted by the Federal Priority Statute. It also sought a declaration that state law may bar the United States' claims if they are not timely filed. Pet. App. 21a. The district court observed:

> [T]he Receiver requests a declaration (A) in Count II, that she may pay the claims of insurance guaranty funds prior to non-policyholder claims by the federal government and (B) in Count I, that federal government claims are subject to the March 9, 1990 filing deadline set by the state receivership court.

Ibid.; see Compl. 11 (Prayer ¶¶ 1-2).[2]

The district court resolved the case on cross motions for dismissal and summary judgment. With respect to the priority for insurance guaranty fund claims, the court ruled in favor of the Massachusetts Insurance Commissioner. The district court explained that, in

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[2] The complaint also sought an order requiring the United States to "act on the Receiver's request for assent or a conditional waiver regarding the proposed fifth distribution to the guarantee funds." Compl. 11 (Prayer ¶ 3). That request for relief has never been acted upon. See pp. 20-21 note 11, *infra*.

United States Department of Treasury v. *Fabe*, 508 U.S. 491 (1993), this Court concluded that certain priorities in Ohio's insurance liquidation scheme were enacted "for the purpose of regulating the business of insurance" and therefore saved from preemption by the McCarran-Ferguson Act. In particular, the Court upheld priorities for administrative and policyholder claims notwithstanding the Federal Priority Statute. Those priorities, the Court stated, regulated "the business of insurance" because they were aimed at the insurer-insured relationship, *i.e.*, ensuring that the insurer would fulfill its promises. But the Court also concluded that other priorities had an insufficient relationship to the insurer-insured relationship to fall within McCarran-Ferguson. Pet. App. 29a-30a. In this case, the district court concluded that the priority for insurance guaranty funds, like the policyholder priority in *Fabe*, was "designed to protect policyholders of an insolvent insurer." *Id.* at 31a. The insurance guaranty fund system, the court stated, expedites payments to policyholders: The guaranty fund pays the insured immediately, but then seeks compensation (with a policyholder-level priority) against the insolvent insurer's estate. *Id.* at 31a-32a.

With respect to untimely claims, however, the district court granted summary judgment in favor of the United States, holding that Massachusetts cannot bar the United States' claims. The question, the court explained, is "controll[ed]" by the First Circuit's decision in *Garcia* v. *Island Program Designer, Inc.*, 4 F.3d 57 (1993). Pet. App. 40a. *Garcia* applied this Court's decision in *Fabe*, *supra*, to hold that the Federal Priority Statute preempts the Puerto Rico insurer liquidation statute's claim-filing deadline. In an opinion by then-Chief Judge Breyer, the court of appeals explained

that the deadline did not regulate "the business of insurance" within the meaning of the McCarran-Ferguson Act and *Fabe*, because it was "not *directed at* the protection of policyholders, insofar as it 'helps policyholders only to the extent that (and in the same way as) it helps all creditors.'" Pet. App. 36a (quoting *Garcia*, 4 F.3d at 62). *Garcia* also observed that the deadline was not "necessary for the protection of policyholders," and "liquidation would still prove manageable" without it. *Ibid.* (quoting *Garcia*, 4 F.3d at 62). The district court concluded that, "[u]nder any fair reading of *Garcia*," it was "obligated to" hold "that the Massachusetts filing deadline in insurance liquidation proceedings" is not covered by McCarran-Ferguson and is therefore "preempted by the federal priority statute." *Id.* at 40a.

3. The parties cross-appealed, and the court of appeals affirmed. Pet. App. 20a. Applying *Fabe*, *supra*, the court of appeals separately examined the two aspects of the Massachusetts scheme at issue. The court determined that the priority given to state insurance guaranty funds was sufficiently tied to the payment of policyholder claims to constitute regulation of the business of insurance within the meaning of the McCarran-Ferguson Act and *Fabe*. Pet. App. 6a-14a. It therefore held that the McCarran-Ferguson Act saved that priority from preemption by the Federal Priority Statute. The United States has not sought this Court's review of that ruling.

The court of appeals also concluded that, under *Fabe*, the claim-filing deadline was not enacted "for the purpose of regulating the business of insurance" and that, as a result, the McCarran-Ferguson Act did not save it from federal preemption. The court explained that its earlier decision in *Garcia* had already resolved that

issue. Pet. App. 15a. The court of appeals nonetheless added "a word about *Garcia*, partly to stress that it is consistent with the view we take of *Fabe*," which "draws the line at state law that focuses protection on policyholder claims." *Id.* at 16a. "An early bar date for the United States," the court reaffirmed, "has only a limited effect on policy holders—who have priority [under *Fabe*] anyway—and equally or primarily helps other general creditors." *Ibid.* "*Garcia*," the court stated, "correctly applied *Fabe*." *Ibid.*

The court of appeals noted that the lack of a firm bar date for federal claims could pose administrative difficulties, but emphasized that "this is a matter for the legislature, not the courts." Pet. App. 17a. Petitioner's effort to subject the United States to a one-year deadline was itself fraught with difficulty, the court stated, because it would subject the United States to a random patchwork of state-law claim deadlines. *Id.* at 18a. The court also noted that "the United States is likely limited as to some of its claims by a patchwork of federal statutes of limitations," *id.* at 17a, and that "the United States may give a waiver" of its rights, *ibid.*

Finally, the court of appeals granted the motion of various guaranty funds (petitioners in No. 02-1135) to intervene. Pet. App. 18a-19a. The court concluded that, because their interests were adequately represented by the Insurance Commissioner (petitioner in No. 02-1125), the guaranty funds could not intervene as of right. *Id.* at 24a. Although the court did not find that the district court had abused its discretion in denying the guaranty funds' motion for permissive intervention, the court of appeals exercised its "own discretion to allow" intervention "in the case at this time on a going-forward basis." *Id.* at 20a.

ARGUMENT

The court of appeals correctly concluded that a state limitations period cannot extinguish the claims of the United States. Its decision does not conflict with any decision of this Court or of any court of appeals, and faithfully applies this Court's decision in *United States Department of Treasury* v. *Fabe*, 508 U.S. 491 (1993). There are, moreover, potential jurisdictional defects that might prevent this Court from reaching the question on which petitioners seek review. Accordingly, further review is unwarranted.

1. Petitioners argue that, under the McCarran-Ferguson Act, state-imposed claim-filing deadlines in insurance insolvency proceedings bind the United States. The court of appeals correctly rejected that contention.

a. Petitioners do not dispute the longstanding and "well settled" rule "that the United States is not bound by state statutes of limitations or subject to the defense of laches in enforcing its rights," unless Congress provides otherwise by statute. *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940); *United States* v. *Thompson*, 98 U.S. 486, 488 (1878) ("a State statute cannot bar the United States"); *United States* v. *Hoar*, 26 F. Cas. 329, 329 (C.C.D. Mass. 1821) (No. 15,373) (Story, J.) (deeming it "too plain for argument, that the statutes of limitations of Massachusetts cannot proprio vigore bind or bar the suits of the national government"). Instead, petitioners rely on the anti-preemption provision of the McCarran-Ferguson Act, 15 U.S.C. 1012(b).

That provision states that "*[n]o Act of Congress* shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the

business of insurance * * * unless such Act specifically relates to the business of insurance." 15 U.S.C. 1012(b) (emphasis added). The rule that state limitations periods do not of their own force extinguish the United States' claims, however, is not an "Act of Congress" or the product of such an Act. It is instead one of the "incidents of * * * sovereignty" that, like sovereign immunity, was "imparted to the new government" when "the national Constitution was adopted"—a part of the constitutional design. *Thompson*, 98 U.S. at 489.[3] As a result, the McCarran-Ferguson Act has no bearing on that rule. And it certainly does not purport to waive the United States' immunity to state limitations periods or otherwise expose its claims to extinction by state law. Contrast 11 U.S.C. 502(b)(9), 101(27) (imposing deadline for claims submission by any "governmental unit," including "the United States," in federal bankruptcy cases). The purpose of the McCarran-Ferguson Act was "to protect state insurance regulation primarily against *inadvertent* federal intrusion," *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 39 (1996), not to surrender federal claims and property rights to state limitations periods.

b. Petitioners' argument also fails under *Fabe*, as the court of appeals properly held. In *Fabe*, this Court held that the McCarran-Ferguson Act's anti-preemption provision applies "to the extent" that a state law regulates the insurer-policyholder relationship. 508

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[3] As the Court explained in *Thompson*: "The exemption of the United States from suits, except as they themselves may provide, rests upon the same foundation as the rule of *nullum tempus* with respect to them. If the States can pass statutes of limitation binding upon the Federal government, they can by like means make it suable within their respective jurisdictions. The evils of such a state of things are too obvious to require remark." 98 U.S. at 490.

U.S. at 508. The Court also made it clear that a law "designed to further the interests of other creditors * * * is not a law enacted for the purpose of regulating the business of insurance." *Id.* at 508-509. Applying that analysis to the elements of the Ohio statute before it, the Court held that Ohio's statutory priority for administrative and policyholder claims regulated the business of insurance, because they ensured "actual performance of [the] insurance contract," a critical element of the insurer-policyholder relationship. *Id.* at 503-505, 508. The Court, however, held that the "preferences conferred upon employees and other general creditors * * * do not escape pre-emption because their connection to the ultimate aim of insurance"—risk spreading and allocation—"is too tenuous." *Id.* at 509.

In this case and in *Garcia* v. *Island Program Designer, Inc.*, 4 F.3d 57, 60-62 (1993), the First Circuit correctly applied *Fabe* to conclude that the McCarran-Ferguson Act does not save insurance insolvency limitation periods from preemption. As the First Circuit has twice explained (Pet. App. 16a; 4 F.3d at 62), such limitations periods are designed to aid in the resolution of the insolvency and to help creditors generally, rather than to affect the rights of policyholders; they thus benefit policyholders only to the degree that they benefit creditors generally. *Fabe* explicitly rejects the argument that "indirect effects are sufficient for a state law to avoid pre-emption under the McCarran-Ferguson Act." 508 U.S. at 508-509. The First Circuit thus correctly held that a general claim-filing deadline does not regulate the business of insurance and does not fall within the McCarran-Ferguson Act's anti-preemption provision.

c. Contrary to the suggestion of petitioners in No. 02-1135 (at 14-16), the decision in this case is consis-

tent not only with *Fabe* but also with *Humana Inc.* v. *Forsyth*, 525 U.S. 299 (1999), and *UNUM Life Ins. Co.* v. *Ward*, 526 U.S. 358 (1999). In *Humana*, the Court concluded that permitting plaintiffs to invoke the federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, against an insurance company did not "invalidate, impair, or supersede" Nevada's laws regulating the business of insurance, even though the federal and state remedies were not precisely parallel. 525 U.S. at 313. There was no dispute, however, that the Nevada laws at issue there were enacted for the purpose of regulating the business of insurance. Thus, the only question was whether the federal law "invalidate[d], impair[ed], or supersede[d]" the Nevada laws. *Id.* at 306-314. Here, in contrast, the question is whether the claims deadline is a law enacted "for the purpose of regulating the business of insurance." That question is controlled by *Fabe*, not *Humana*.

Further, while petitioners in No. 02-1135 invoke *UNUM Life* for the unremarkable proposition that courts evaluating preemption should consider whether state laws specifically address policy issues unique to the insurance context, the First Circuit did exactly that here. It concluded that, unlike the law at issue in *UNUM Life*, claims deadlines in liquidation are not unique to insurance regulation, and benefit all creditors generally, rather than policyholders in particular. That is especially true where, as here, actual policyholders—who should be identifiable by the receiver and have a priority in any event—should be unaffected by late-filed federal creditor claims. *Fabe* makes it clear that state laws are not automatically protected by

McCarran-Ferguson merely because they deal with insurer insolvency.[4]

2. Petitioners' contention that the lower courts are divided (02-1124 Pet. 21-26; 02-1135 Pet. 11-14), is likewise incorrect. See Pet. App. 15a & n.6 (explaining that petitioner in No. 02-1124 "perhaps overargues" that "a few courts elsewhere have not agreed with *Garcia*"). First, while petitioners argue that "the Tenth, Fifth, and Second Circuit[s] * * * have taken a broader view of the protection accorded state insurer liquidation," 02-1124 Pet. 23; see 02-1135 Pet. 11-14, not one of the court of appeals cases they cite—*Munich Am. Reins. Co.* v. *Crawford*, 141 F.3d 585 (5th Cir.), cert. denied, 525 U.S. 1016 (1998); *Davister Corp.* v. *United Republic Life Ins. Co.*, 152 F.3d 1277 (10th Cir. 1998), cert. denied, 525 U.S. 1199 (1999); and *Stephens* v. *American Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995)—addresses claim-filing deadlines, much less deadlines that purport to extinguish the rights of the United States. To the contrary, those cases concerned the relationship between the McCarran-Ferguson Act and the Federal Arbitration Act, as petitioners concede (02-1124 Pet. 24). The only federal court of appeals to have addressed the question presented here is the First Circuit—in this case and in *Garcia*, *supra*—a consideration that itself weighs against further review.[5]

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[4] The court of appeals' suggestion that "the dissenting position in *Fabe*" might some day "prevail," Pet. App. 9a, undermines rather than supports petitioners' position. The dissenters in *Fabe* would have held that no part of the Ohio insolvency statute, not even its priority scheme, is a law "enacted . . . for the purpose of regulating the business of insurance." 508 U.S. at 514 (Kennedy, J., dissenting).

[5] Petitioners also assert a conflict with a district court case, *Boozell* v. *United States*, 979 F. Supp. 670 (N.D. Ill. 1997). But that

Two of the cases cited by petitioners (the Second Circuit's decision in *Stephens* and the Tenth Circuit's decision in *Davister*), moreover, cite the First Circuit's *Garcia* decision with apparent approval, as the court of appeals pointed out. Pet. App. 15a-16a n.6 (citing *Davister*, 152 F.3d at 1281 n.5, and *Stephens*, 66 F.3d at 45). The Fifth Circuit's decision in *Munich* merely notes a "potential difference in approach between *Stephens* and *Garcia*." *Id.* at 16a n.6 (citing *Munich*, 141 F.3d at 592). And any difference is readily explained by the distinct questions presented. Unlike the effort to bar the United States' claims at issue here and in *Garcia*, the invalidation of arbitration clauses in private insurance and reinsurance policies at issue in *Stephens* clearly regulates the terms of policyholder and reinsurance contracts; it thus falls within the McCarran-Ferguson Act's anti-preemption rule. See *Stephens*, 66 F.3d at 44-45 (upholding anti-arbitration rule because it directly "regulates the performance of insurance contracts" and thus "is crucial to the 'relationship between [an] insurance company and [a] policyholder'") (quoting *Fabe*, 508 U.S. at 501).

For similar reasons, petitioners (02-1124 Pet. 22; 02-1135 Pet. 10) err in relying on *State ex rel. Clark* v. *Blue Cross Blue Shield of West Virginia, Inc.*, 510 S.E.2d 764 (W. Va. 1998), which involved a distinct statutory scheme. Here, the Massachusetts Insurance Commissioner sought a ruling that would permit "denial" of "late-filed claims," including those of the United States. Pet. App. 26a; pp. 5-6, *supra*. In contrast, the West Virginia statute at issue in *Clark* accorded lower

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case is not binding precedent even within the Northern District of Illinois. See, *e.g.*, *Howard* v. *Wal-Mart Stores, Inc.*, 160 F.3d 358, 359 (7th Cir. 1998).

priority to late-filed claims, but did not attempt to extinguish them altogether. *Clark*, 510 S.E.2d at 781. The West Virginia Supreme Court relied on that difference, holding that "a state may impose a limitation date on federal claims against an insolvent insurance company * * * *when that date merely subordinates the priority of late-filed federal claims rather than causing them to be absolutely invalidated.*" *Id.* at 779 (emphasis added). The court repeatedly emphasized that difference. "[N]o proofs of claim are rendered void or invalid due to their untimely filing," it reiterated, and "[c]onsequently, [the statutory provisions in issue] do not violate the principle that the United States is not bound by state statutes of limitation." *Id.* at 781.[6] *Clark* thus turned at least in part on the fact that the statute there, unlike the one here, did not seek to void or invalidate the United States' claims. There thus is no conflict between this case and *Clark*, and petitioners would not prevail even under *Clark*'s rationale.[7]

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[6] See *Clark*, 510 S.E.2d at 779 (distinguishing state laws "that completely abrogated the government's claim or suit"); *id.* at 780 ("Unlike a statute of limitation, the time limitation and claim subordination imposed by [West Virginia law] do not prohibit the United States from bringing its claim.").

[7] For that reason, the concerns that *Clark* expressed about the result in *Garcia* are not properly presented by the petition; this case would have been resolved the same in either court. *Clark*'s conclusion that a state insurance liquidation statute may accord untimely claims by the United States a lower priority than timely filed policyholder claims is also consistent with *Garcia*'s suggestion that a trustee "would have to provide, for example, the United States with a first priority so long as he had, say, actual notice (or 'constructive' notice through recording) of the claim" if "he did not have formal notice through a 'proof of claim' filed directly in the liquidation proceeding." 4 F.3d at 62. While we do not necessarily agree with the result in *Clark*, particularly insofar as it purports to

Petitioners also indulge in hyperbole when they claim that the court of appeals' decision has the practical effect of preventing receivers from paying policyholder claims. In fact, the court of appeals' decision expressly upholds Massachusetts' statutory *priority* for policyholder and guaranty fund claims; it thus promotes rather than impedes distributions to those claimants. See Pet. App. 10a-14a. Petitioners' prophecies, moreover, are at odds with the fact that the law of the First Circuit they challenge, regarding state-law filing deadlines for United States' claims, has been settled for nearly a decade now, since *Garcia*. And the decision in this case nowhere declares that States cannot pay timely policyholder claims ahead of untimely policyholder claims for which they have no notice (including those of the United States). See pp. 16-17 note 7, *supra*. Thus, as the court of appeals observed, an earlier "bar date for United States claims has only a limited effect on policyholders—who have priority anyway." Pet. App. 16a; *Garcia*, 4 F.3d at 62 (without bar date, liquidation of policyholder claims "would still prove manageable").

Petitioners also appear to understate the protection offered by federal limitations periods,[8] the ability of receivers to limit their exposure by examining the

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subordinate untimely United States policyholder claims to non-policyholder claims, neither *Clark* nor its rationale conflicts with the First Circuit's decision here.

[8] A number of courts have held that government claims in cases like this one are subject to the statutes of limitations set forth in 28 U.S.C. 2415-2416. See, *e.g.*, *United States* v. *Moriarty*, 8 F.3d 329, 332-333 (6th Cir. 1993) (holding that 28 U.S.C. 2415(a)'s six-year limitations period for contract actions applied to action against debtor's representative under 31 U.S.C. 3713(b)); *United States* v. *Dawkins*, 629 F.2d 972, 975 (4th Cir. 1980) (same).

insurer's policy records, and the extent to which the United States cooperates with state officials to facilitate claims resolution. Here, for example, the United States voluntarily waived its asserted priority to permit $174 million in early distributions. See Pet. App. 25a-26a & n.9; 02-1124 Pet. 13. Petitioners, however, neither sought the United States' cooperation following the filing of notices of appeal in this case in late 2001, nor after the court of appeals resolved the legal uncertainty surrounding the United States' and petitioners' rights in October 2002. Nonetheless—in light of the court of appeals' resolution of the legal rights of the parties and further research—the United States has contacted counsel for petitioner in No. 02-1124 to propose a resolution petitioner had once proposed herself, see Pet. App. 67a.

3. Finally, we note a potential jurisdictional barrier to further review, not yet addressed by the parties or the courts. Because this lawsuit was brought against the United States and the Attorney General in his official capacity in an effort to limit the claims and property rights of the United States, federal courts lack jurisdiction over it absent an Act of Congress waiving the United States' immunity to suit. See *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-690 (1949) (suit seeking to bar government's sale and delivery of its coal to anyone but respondent is an action against the sovereign); see *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 101-102, 112-113 (1984) (suit for decree that operates against sovereign is an action against the sovereign). "The terms of [the] waiver of sovereign immunity define the extent of the court's jurisdiction," *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986), and must be strictly construed in favor

of the sovereign, *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992).[9]

The complaint in this case (at 11, ¶ 2) relied on the waiver of immunity contained in the Administrative Procedure Act (APA), 5 U.S.C. 702. That waiver, however, applies only to suits brought under the APA itself—that is, suits for judicial review of final "agency action," 5 U.S.C. 702, requesting that the action be held unlawful and set aside, or that action unlawfully withheld or unreasonably delayed be compelled, 5 U.S.C. 706.[10] As this Court has explained, any plaintiff

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[9] Sovereign immunity is sufficiently "jurisdictional in nature," *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994), that the issue can be raised for the first time on appeal, *Finn* v. *United States*, 123 U.S. 227, 232 (1887); cf. *Patsy* v. *Board of Regents*, 457 U.S. 496, 516 n.19 (1982) (sovereign immunity "sufficiently partakes of the nature of a jurisdictional bar that it may be raised by the State for the first time on appeal" (internal quotation marks omitted)). It likewise cannot be waived by the actions of individual executive officers. *Munro* v. *United States*, 303 U.S. 36, 41 (1938); *Finn*, 123 U.S. at 232-233; see *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983) (waiver must be enacted by Congress).

[10] That is clear from the waiver's location—it appears as part of the APA in 5 U.S.C. 702 rather than as a free-standing enactment—and its legislative history. See *Administrative Procedure Act Amendments of 1976: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 105 (1976) (testimony of then-Assistant Attorney General Scalia) ("an important factor in our support for the bill" is "that the waiver of immunity, since it is made via section 702, will only apply to claims relating to improper official action; and will be subject to the other limitations of the Administrative Procedure Act"); H.R. Rep. No. 1656, 94th Cong., 2d Sess. 11 (1976) ("Since the Amendment is to be added to 5 U.S.C. section 702, it will be applicable only to functions falling within the definition of 'agency' in 5 U.S.C. section 701."). The waiver's authors expressed the same view: "Because the amend-

"claiming a right to sue [under Section 702] must identify some 'agency action' that affects him in the specified fashion"; and "it is judicial review 'thereof' to which he is entitled." *Lujan* v. *Defenders of Wildlife*, 497 U.S. 871, 882 (1990).

Here, petitioners do *not* challenge final agency action, or seek to have such action set aside. Nor do they seek to compel agency action that has been withheld. Rather, they ask the Court to address *en vacuo* the validity of a state statute that purports to extinguish the United States' right to money or property, without regard to the propriety of any federal conduct. Indeed, the only part of the complaint that even arguably addressed agency action appears to have been abandoned.[11] Because petitioners have neither "identif[ied]

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ment is to be added to 5 U.S.C. § 702 (a provision of the Administrative Procedure Act entitled right of review)," the Chairman of the ABA's Administrative Law Section explained, "it will be applicable only when that provision is applicable." *Sovereign Immunity: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 59 (1970) (statement of Dan M. Byrd, Jr.); *id.* at 222 (testimony of Prof. Kenneth Culp Davis) ("Because the amendment is to be added to 5 U.S.C. §§ 702 and 703 * * * it will be applicable only when those provisions are applicable."); *id.* at 238 (testimony of Prof. Roger Cramton) ("The proposal is an amendment to the Administrative Procedure Act" and thus "is applicable only to administrative conduct * * * that is contemplated for judicial review by the APA.").

[11] Petitioner's *only* claim relating to agency action was Count III, which asserted that the United States "unreasonably delayed action" on the request for a waiver of its priority rights. Compl. 11, ¶ 35; see *ibid.* (Prayer ¶ 3) (requesting order requiring the United States to act on request for assent). That allegation and the associated prayer for relief, however, were never addressed by any court, and petitioners do not press them in this Court. They are not, moreover, cognizable under the APA. Under 5 U.S.C.

some 'agency action' that affects [them] in the specified fashion" nor sought "judicial review" of that agency action, *Lujan*, 497 U.S. at 882, their claim does not arise under the APA and is not covered by the waiver of immunity provided therein.

For similar reasons, the complaint (at 3, ¶ 2) errs in suggesting that *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. at 689-690, authorizes this suit. *Larson* held that an action seeking to prohibit an authorized federal officer from selling and delivering federal property to anyone but the plaintiff *is* an action against the sovereign itself—and therefore barred by sovereign immunity—because it seeks disposition of the sovereign's property. 337 U.S. at 688. The same is true of petitioner's suit, which seeks to terminate the United States' claims against the estate. Petitioner, furthermore, has identified no unconstitutional or otherwise *ultra vires* conduct (much less final agency action) that (by legal fiction) may be deemed individual conduct rather than that of the United States itself. See *Larson*, 337 U.S. at 689-690; *Pennhurst*, 465 U.S. at 102, 104-105, 112-117. The resulting jurisdictional doubts weigh heavily against further review.[12]

701(a)(2), no provision of the APA (including the waiver of immunity in Section 702) applies where "agency action is committed to agency discretion by law." Decisions concerning whether or when to enforce the rights of the United States are, barring constitutional infirmity, ordinarily committed to agency discretion by law within the meaning of Section 701(a)(2). See *Heckler* v. *Chaney*, 470 U.S. 821, 830, 835-837 (1985); *Lincoln* v. *Vigil*, 508 U.S. 182, 191-192 (1993). As to such decisions, there is "no law to apply." *Webster* v. *Doe*, 486 U.S. 592, 599 (1988).

[12] There may have been a similar issue lurking in the record in *Fabe*, but it appears to have passed unnoticed. See *Pennhurst*, 465 U.S. at 119 ("[W]hen questions of jurisdiction have been passed on

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2003

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in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."); *Webster* v. *Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the Court nor ruled upon, are not considered as having been so decided as to constitute precedent."); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (where issue was not "raised in briefs or argument nor discussed in the opinion," decision is not "binding precedent on th[e] point").

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IN THE
Supreme Court of the United States

JULIANNE M. BOWLER, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF INSURANCE OF THE COMMONWEALTH OF MASSACHUSETTS AND PERMANENT RECEIVER OF AMERICAN MUTUAL LIABILITY INSURANCE COMPANY AND AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,

Petitioner,

v.

UNITED STATES AND JOHN ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the Petitioner incorporates the corporate disclosure statement made in the Petition for Writ of Certiorari and states that it is current.

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PETITIONER'S REPLY BRIEF

Pursuant to Supreme Court Rule 15.6, the Receiver submits this reply to address new arguments in the Brief for the Respondents in Opposition ("U.S. Br.").

I. CONTRARY TO THE UNITED STATES' NEW SUGGESTION, THE DECISION OF THE COURT OF APPEALS PREVENTS THE PAYMENT OF POLICYHOLDER CLAIMS IN STATE INSURER LIQUIDATION PROCEEDINGS.

After two years of litigation prompted by its refusal to waive claims and permit a policyholder level distribution, the United States now suggests that the absence of a claim filing deadline applicable to it does not prevent a receiver from paying policyholder creditors. It says that:

> Petitioners also indulge in hyperbole when they claim that the court of appeals' decision has the practical effect of preventing receivers from paying policyholder claims. . . . [T]he decision in this case nowhere declares that States cannot pay timely policyholder claims ahead of untimely policyholder claims for which they have no notice (*including those of the United States*).

U.S. Br. 17 (emphasis added); *see id.* at 13 (actual policyholders "should be unaffected by late-filed federal creditor claims"). This is flatly inconsistent with the United States' position throughout the liquidation proceedings that it has a statutory right to assert priority claims at any time. In a letter to the Receiver dated July 20, 1989, the Department of Justice stated:

> This letter constitutes notice to you, as the Massachusetts receiver, that the United States asserts priority status with regard to the debts due it from [American Mutual]. Priority status is asserted on behalf of the United States, its departments, agencies and instrumentalities.

> *Priority status extends to all claims in their full amounts previously and hereafter filed* against [American Mutual] and is based upon 31 U.S.C. § 3713 and any other federal statutes granting priority status. To the extent Massachusetts law is inconsistent with federal law in this regard, it is inapplicable.

C.A. App. 121 (emphasis added). In its motion to dismiss papers filed February 3, 2001, the Department of Justice stated it had made a "decision not to waive the United States' claims to the fifth distribution to the state guaranty funds." C.A. App. 126. If the United States were to agree that receivers can pay timely policyholder claims and not pay late filed United States policyholder claims without incurring liability under the Federal Priority Statute, it should say so in a clear, binding and public way, not in elusive statements in a brief opposing review of a contrary court of appeals decision.

The United States' discussion blurs the critical point that, under the Court of Appeals' decision, the States may commence liquidation proceedings for insolvent insurers, but they cannot pay policyholder claimants until the United States decides to permit payment. If the Federal Priority Statute preempts state claim filing deadlines, a receiver who distributes assets to policyholders faces personal liability under the Federal Priority Statute for unpaid late United States policyholder claims. *See* U.S. Br. 2 (quoting the personal liability provision of 31 U.S.C. § 3713(b)). The practical effect of the decision is to prevent state insurance commissioners as receivers of insolvent insurers from paying policyholder claims without first obtaining a waiver from the United States. As shown in the brief *amicus curiae* of the National Association of Insurance Commissioners, delays in payment will harm policyholder claimants in insurer liquidation proceedings across the nation – the policyholders in-

tended to be protected by the claim filing deadline statutes enacted in every state. *See* Pet. App. 60a.[1]

This case shows that the United States will in fact prevent payments to policyholder claimants by ignoring and refusing requests by state insurance commissioners appointed as receivers by the state courts. The Receiver made a proposal to defer the dispute while permitting policyholder distributions on September 16, 1998, Pet. App. 67a, and requested a conditional waiver to permit a $10 million policyholder level distribution on May 14, 1999, C.A. App. 147, but the United States would not respond. C.A. App. 57. The United States' suggestion (U.S. Br. 18) that the Receiver should have "sought the United States' cooperation" during the lawsuit ignores this history of disregard. Count III of the Receiver's November 22, 2000 complaint sought to "compel agency action unreasonably delayed" under 5 U.S.C. § 706(1), which finally prompted the United States to announce a "decision not to waive its claims" in its motion papers. C.A. App. 126. The intimation (not based on the record) that the United States might seek to moot the case (U.S. Br. 18) should be put aside. The simple response is that it has not done so. Belated telephone calls made days before the due date for its brief in opposition in this Court merely confirm that the United States is moved only by litigation deadlines.[2]

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[1] The plan of liquidation for American Mutual providing that late filed claims would be denied was approved by the Single Justice of the Massachusetts Supreme Judicial Court on June 28, 2002.

[2] The United States has not waived claims to permit a distribution to policyholders or offered to agree to the Receiver's earlier pre-suit proposal, which in any event, sought to defer, not resolve, this dispute and expressly reserved the issues for future litigation. Pet. App. 67a, 71a-72a. It is now too late to defer litigation, and the decision of the Court of Appeals will prevent distributions in the American Mutual and other pending Massachusetts insurer liquidation proceedings. This case presents a live and important controversy.

The United States attempts to downplay the potential liability of receivers who pay policyholders without a waiver (U.S. Br. 17-18), but its assertions only underscore the risks of making a distribution without federal approval. The United States first suggests that receivers will be protected by federal limitations periods. However, it cites cases (U.S. Br. 17 n.8) showing that a receiver is at risk of a United States claim under the Federal Priority Statute for six years *after* making a distribution. *E.g.*, *United States v. Moriarty*, 8 F.3d 329, 332-333 (6th Cir. 1993) (United States has six years after debtor's representative makes payment to bring action under 31 U.S.C. § 3713(b)). Decisions holding that the United States has six years to sue after a distribution provide no comfort to receivers who want to pay policyholders.

The United States also asserts that receivers can protect themselves by examining insurers' policy records. But those records will not necessarily reveal even pending claims by the United States against policyholders, much less unasserted or unknown claims. Claims like the Environmental Protection Agency's claim for recovery of an insured's environmental liabilities under the Superfund statute – a policyholder level claim, *see* Petition at 5, that asserted priority under the Federal Priority Statute (C.A. App. 89) – can seek large amounts and take years to emerge. Indeed, thirteen years after the liquidation began, the Department of Justice explained to the Court of Appeals in this case that the United States was "concerned that the remaining assets of the insolvent companies might not be sufficient to cover its claims." C.A. U.S. Br. 8 (April 16, 2002).

In sum, the unlimited exemption from deadlines asserted by the United States and accepted – but described as "simply terrible public policy" (Pet. App. 16a) – by the Court of Appeals harms policyholders by preventing payment and warrants review.

II. THE UNITED STATES FAILS TO ADDRESS THE APPLICABLE MCCARRAN-FERGUSON STANDARDS AS ARTICULATED IN *FABE* AND APPLIED CORRECTLY BY OTHER COURTS OF APPEALS.

The United States contends that the First Circuit was correct because state claim filing deadlines "benefit policyholders only to the degree that they benefit creditors generally." U.S. Br. 13. There are two responses to this argument. *First*, the claim filing deadline benefits policyholders more than others because it permits payments to policyholder creditors, and those creditors are preferred over others by state priority statutes. Since policyholders are the first class of creditors paid after administrative expenses under state priority statutes, *see* Pet. App. 62a (listing "*Fabe*-cured" state priority statutes), *e.g.*, Mass. G.L. c. 175, § 180F, policyholder claimants necessarily benefit to an extent greater than other creditors, who will be paid only after policyholders are paid in full. *See id.*; Pet. App. 10a. Indeed, because of the limited assets in the American Mutual liquidation, creditors below the policyholder level will receive nothing.

Second, *Fabe* did not require that policyholders be the *only* ones to benefit from a state provision for the statute to be protected from preemption by McCarran-Ferguson. If that were the case, then the administrative priority upheld by the Court in *Fabe* would have been preempted because the administration of a liquidation proceeding potentially benefits all creditors. The Court, however, found that the administrative expense priority was "reasonably necessary to further the goal of protecting policyholders" and therefore enacted "for the purpose of regulating the business of insurance" within the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 509 (1993); *see* Pet. App. 10-11a.

The Court of Appeals for the First Circuit has now twice failed to apply the "reasonably necessary to fur-

ther the goal" test applied in *Fabe*. In this case, it adhered to *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993) (Breyer, C.J.), which it quoted as saying that the filing deadline was "neither directed at, nor necessary for, the protection of policyholders . . . . The provision helps policyholders only to the extent that (and in the same way as) it helps all creditors." Pet. App. 15a, quoting 4 F.3d at 62. *Fabe*, however, required only that a state statute be "reasonably necessary to further the goal of protecting policyholders," not that it "primarily help" or be only "directed at" or "necessary" to protect them. 508 U.S. at 509. Only where a state provision "is designed to further the interests of other creditors" is it outside the protection of McCarran-Ferguson. *Fabe*, 508 U.S. at 508.

The United States' departure from the clear terms of *Fabe* underscores the need for review by the Court to provide clear guidance to the lower federal courts concerning application of the McCarran-Ferguson Act to insurer liquidations. The United States does not address the fact that the courts of appeal for the Fifth and Tenth Circuits reject the First Circuit's position that benefit to other creditors disqualifies a provision from protection under McCarran-Ferguson. Petition 23-24. The importance of the current split in the circuits is magnified by the number of insurer liquidations pending throughout the United States. Pet. 16-19. The briefs of *amici curiae* demonstrate the national interest in the resolution of the issue presented by the petition in this case. The brief in opposition of the United States only heightens the need for plenary review.

III. THERE IS NO JURISDICTIONAL BARRIER TO REVIEW BY THIS COURT: THE COMPLAINT IS NOT BARRED BY SOVEREIGN IMMUNITY BECAUSE IT ALLEGES THAT A FINAL ACTION OF THE ATTORNEY GENERAL EXCEEDS HIS AUTHORITY UNDER FEDERAL LAW.

The United States raises for the first time in this Court "a potential jurisdictional barrier to further review." U.S. Br. 18 (conceding that the "barrier" has "not yet [been] addressed by the parties or the courts"). However, there is no jurisdictional barrier to review by this Court because the complaint alleges and the record shows a final action by the Attorney General that the Receiver claims to exceed his authority under federal law. The complaint alleges that (1) the "United States has waived its immunity from this suit by 5 U.S.C. § 702," and (2) in any event, "this suit is not barred by sovereign immunity because it is one against a federal official claiming that she (the Attorney General) has acted beyond her statutory authority. *See Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689-690 (1949)." C.A. App. 10-11. Both of these grounds support the jurisdiction of the Court over the Petition.

First, this case falls within 5 U.S.C. § 702. The United States' contrary argument ignores the plain terms of the complaint and the findings of the courts below. The United States asserts that "petitioners do not challenge final agency action, or seek to have such action set aside." U.S. Br. 20. It further states that the complaint is "without regard to the propriety of any federal conduct." *Id.* These statements are incorrect. The complaint alleges that the "United States has taken the position that claims by it are not subject to time limits imposed by state law for claims against the estates of insolvent insurers." Compl. ¶ 17, C.A. App. 16. The complaint cites a letter from the Department of Justice to the Receiver asserting

the preemptive effect of federal law in this receivership. Compl. ¶ 16, Ex. B, C.A. App. 16, 27-28. The declaration sought by the complaint rests on the theory that the action of the Attorney General regarding the receivership is "beyond [his] authority" under federal law. C.A. App. at 11.

The decisions below confirm that this action is one for non-monetary specific relief concerning the illegality of a final action of an officer of the United States. According to the Court of Appeals, the "United States has asserted throughout [the receivership] that . . . the one-year bar date does not apply to any of its claims." Pet. App. 4a. The Court of Appeals also noted that "[s]ome of the [United States'] claims were filed after the one-year deadline" established by the Massachusetts Supreme Judicial Court. Pet. App. 4a, 14a. *See also* Pet. App. 26a, 34a (District Court decision). Thus the undisputed facts concerning the pending claims and legal position of the United States establish final action subject to judicial review under 5 U.S.C. § 702. Contrary to the tardy argument of the United States, this is "agency action" that "affects" the Receiver in a "specified fashion" and is subject to "judicial review." U.S. Br. 20, citing *Lujan v. Defenders of Wildlife*, 497 U.S. 871, 882 (1990).[3]

Second, even if 5 U.S.C. § 702 did not establish a waiver of sovereign immunity, this action properly proceeded under the authority of *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-690

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[3] The complaint further alleged in Count III that the United States had "failed to act" on the "Receiver's request for a conditional waiver regarding her proposed fifth distribution to guaranty funds." C.A. App. 16. The United States asserts incorrectly that this "allegation and the associated prayer for relief . . . were never addressed by any court." U.S. Br. 20 n.11, 6 n.2. The District Court ruled that the Receiver's request for an order compelling the Attorney General to act on the Receiver's fifth request for a waiver was "moot . . . because the United States through this litigation has denied her request." Pet. App. 46a n.30. Judgment on Count III entered accordingly. Pet. App. 51a.

(1949). Under "the so-called *Larson* exception, in certain circumstances, an action will not be considered against the United States, and thus will not be barred by sovereign immunity, if it is one for specific relief against the federal officers." 16 J. C. Moore, *et al.*, *Moore's Federal Practice*, § 105.23 (3d ed. 2003). "The prohibition on suits against the United States does not apply in suits in which plaintiffs sue for specific relief against federal officers, alleging either (1) that the officers have acted beyond their statutory authority or (2) that the statute conferring power upon the officers is unconstitutional." *Id.*, citing *Larson*, 337 U.S. at 689-690; *Dugan v. Rank*, 372 U.S. 609, 621-622 (1963); *Malone v. Bowdoin*, 369 U.S. 643, 647-648 (1962).

Here, the Receiver's complaint alleges that the Attorney General – in asserting to the Receiver and in the courts below that the United States is not bound by a state deadline for claims but rather is free to file claims against the estate at any time – has acted beyond his authority under federal law. Before this case reached this Court, the United States apparently viewed such a claim as not barred by sovereign immunity; in a similar case brought by the Illinois Commissioner of Insurance as receiver, the United States filed a two-count counterclaim against the Commissioner. *See Boozell v. United States*, 979 F. Supp. 670, 671-72 (N.D. Ill. 1997). In this case, the District Court noted that the United States "contend[ed] the issues [presented by the Receiver] are essentially questions of law *adequately framed by the complaint*[.]" Pet. App. 22a n.2 (emphasis added). In this Court, however, the United States has changed its position and raised an 11th-hour, "jurisdictional" point to avoid plenary review of a question that affects insurer insolvencies throughout the country. The Court should not permit unfounded "jurisdictional doubts" (U.S. Br. 21) to insulate the legal position of the United States from judicial review, particularly where, as here, the court of appeals has described that posi-

tion as reflecting "simply terrible public policy." Pet. App. 16a.[4]

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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[4] The United States also raises an argument based on the rule of immunity from statutes of limitation applied in *United States v. Summerlin*, 310 U.S. 414 (1940), that was rejected by the District Court (Pet. App. 34a-35a) and not separately addressed by the Court of Appeals. As the United States concedes (U.S. Br. 10), the rule is subject to modification by Congress. Pet. App. 15a. *See Stanley v. Schwalby*, 147 U.S. 508, 515 (1893). The Court has found congressional waiver and subjected the United States to state limitations on federal recovery of debts. *See Fink v. O'Neil*, 106 U.S. 272, 284-85 (1882); *Board of County Comm'rs v. United States*, 308 U.S. 343, 351-53 (1939). The Court held, in effect, that the rule in *Summerlin* applies where a conflict exists between the interests of the United States and the States. Where, however, Congress authorizes state regulation of a particular subject, there is no such conflict. The McCarran-Ferguson Act, 15 U.S.C. §§ 1011, 1012, and the exclusion of insurance companies from the Bankruptcy Code by 11 U.S.C § 109(b), reflect a congressional judgment that the state rule furthers national interests and that the general immunity of the United States from statutes of limitation is waived. *See* Pet. App. 35a.